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CASE NO.: 83-5840

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL JACKSON,

Petitioner,

vs

THE STATE OF FLORIDA

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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CASE NO.: _____

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CARL JACKSON,

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vs

THE STATE OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA SUPREME COURT, WHICH RELIED UPON THE "OUTCOME-DETERMINATIVE" TEST OF UNITED STATES V. DECOSTER, 624 F.2d 196 (D.C. Cir. 1979) AND KNIGHT V. STATE, 394 So.2d 997 (Fla. 1981), APPLIED THE CORRECT STANDARD FOR REVIEW OF PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?[1]

1/ Those parties to the proceeding in the Florida Supreme Court are included within the caption of the case in this Court. See Rule 28.1(b), Revised Rules of the Supreme Court of the United States.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED BELOW

Petitioner seeks review of the decision of the Florida Supreme Court in Jackson v. State, 437 So.2d 147 (Fla. 1983).

See also Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102 (1979).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Petitioner seeks this Court's review of the decision of the Supreme Court of Florida in Jackson v. State, 437 So.2d 147 (1983), Opinion filed 28 July 1983, rehearing denied 30 September 1983. The Florida Supreme Court's Opinion applies a standard of review of the Petitioner's claim of ineffective assistance of counsel that is in conflict with decisions of the United States Courts of Appeals for the Fifth and Eleventh Circuits. Specifically, the Florida Supreme Court's Opinion is in conflict with that standard of review enunciated in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc), cert. granted, _____ U.S. _____, 103 S.Ct. 2451, 75 L.Ed. 2d _____ (1983); as noted, this Court has recently granted certiorari jurisdiction in the Washington case to address this issue. Accordingly, the Petitioner requests that this Court grant certiorari jurisdiction in the instant case to determine, in conjunction with the Washington case, the appropriate standard of review for ineffective assistance of counsel claims.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

This case involves the Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence.

STATEMENT OF THE CASE AND OF THE FACTS

In September of 1975, the Petitioner was convicted of two counts of murder in the first degree, robbery and kidnapping after a trial by jury in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida. The Defendant was represented by an Assistant Public Defender during trial and on appeal to the Florida Supreme Court. That Court affirmed the Petitioner's convictions on all counts in Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102 (1979). See Exhibit 1, APPENDIX.

The Petitioner subsequently filed a motion for post-conviction release before the trial Court pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. See Exhibits 2-4, APPENDIX. Petitioner alleged that his appointed attorneys had rendered ineffective assistance of counsel throughout the course of Petitioner's trial, sentencing and initial appeal to the Florida Supreme Court. See Exhibit 3, APPENDIX (entitled AMENDMENT TO MOTION FOR POST-CONVICTION RELIEF), and Exhibit 4 (entitled SECOND AMENDMENT TO DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF). After a hearing on the matter, the trial Court denied the Petitioner's motion. See Exhibits 5 and 6, APPENDIX.

JACKSON appealed to the Florida Supreme Court but received no relief from that tribunal on his claim of ineffective assistance of counsel. In Jackson v. State, 437 So.2d 147 (Fla. 1983), the Florida Supreme Court relied upon the standard for review of claims of ineffective assistance of counsel articulated in Knight v. State, 394 So.2d 997 (Fla. 1981) to affirm the trial Court's denial of the Petitioner's post-conviction Motion. See Exhibit 7, APPENDIX. The Court found that, while the Petitioner had sufficiently detailed those omissions or overt acts upon which he claimed ineffective assistance of counsel, "he failed to show that most of the

admissions were serious deficiencies beyond what would be expected of competent counsel." 437 So.2d at 149. The Court continued:

> His expert witness' testimony that defense counsel's pre-trial discovery and motions were inadequate was countered by that of appellee's expert witness who stated that the representation provided was 'reasonably effective.' The trial court agreed with appellee's witness and nothing in the record compels us to disturb that result.
>
> The lack of objection to the labeling of the fingerprint also fails to convince us that counsel was ineffective. Even if we agreed that such was measurably below what is expected of competent attorneys, it certainly did not so prejudice appellant that he might otherwise not have been found guilty, since it was not disputed that his fingerprint was found at the scene.
>
> The remainder of the alleged shortcomings may be dismissed in a similar manner. The 'failure to investigate and present a defense' and to request instructions on the effect of a jury recommendation of mercy do not fall measurably below the standard expected of competent counsel. Although appellant is obviously dissatisfied with the result of the defense that was presented, we will not use the perfect vision of hindsight and label that defense incompetent. It was, under the circumstances, a reasonable strategy.
>
> Defense counsel's voir dire examination regarding pretrial publicity, racial bias, and imposition of the death penalty was not so lacking as to be considered incompetent. If it was deficient at all, it was not substantial enough to demonstrate a prejudice to appellant so severe that it affected the outcome of the proceedings. The record shows that appellant's guilt was clearly and convincingly demonstrated by more than adequate evidence. Any shortcomings in voir dire were not the conclusive and decisive factors in his conviction.
>
> As the trial court noted in denying appellant's rule 3.850 motion, a 'textbook defense' is not the requirement here. The trial court heard the arguments in the 3.850 hearing, considered the expert testimony presented by both sides, and determined that the respresentation afforded appellant was adequate. None of the arguments raised convince us that said

decision was unsubstantiated or incorrect, and so the trial court's decision is affirmed.

Id. at 149-50.

JACKSON sought rehearing before the Supreme Court of Florida, arguing that the recent decision of Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983) required reconsideration of whether Petitioner's trial counsel had adequately investigated and presented a defense. See Exhibit 8, APPENDIX. Petitioner recited trial counsel's failure in the instant case to adequately conduct discovery and investigate and prepare in anticipation of trial. Such ineffective assistance, Petitioner argued, "falls well below the standard of effective assistance of counsel as applied in Weidner." See Exhibit 8, APPENDIX, at p. 4.

The Florida Supreme Court denied rehearing, without opinion, on 30 September 1983. See Exhibit 9, APPENDIX. Mandate was issued by that Court on 1 November 1983. See Exhibit 10, APPENDIX.

ARGUMENT

THE FLORIDA SUPREME COURT, WHICH RELIED UPON THE "OUTCOME-DETERMINATIVE" TEST OF UNITED STATES V. DECOSTER, 624 F.2d 196 (D.C. Cir. 1979) AND KNIGHT V. STATE, 394 So.2d 997 (Fla. 1981), APPLIED THE INCORRECT STANDARD FOR REVIEW OF PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner argued before the Florida Supreme Court that it should apply the standards of review articulated in Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983) to his claim of ineffective assistance of counsel. The facts of the Weidner case are analogous to those of the instant case; however, the Weidner court, applying the standard of review for ineffective assistance of counsel claims articulated in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc),

cert. granted, _____ U.S. _____ 103 S.Ct. 2451, 75 L.Ed. 2d _____ (1983) found that Weidner's trial counsel had been ineffective.

The Eleventh Circuit Court of Appeals concluded in Washington v. Strickland that in order to be successful on a claim of ineffective assistance of counsel, a petitioner must demonstrate both a denial of effective assistance of counsel and a showing of actual and substantial prejudice. If this burden is met by a petitioner, the burden shifts to the State to prove that trial counsel's ineffectiveness was harmless beyond a reasonable doubt. 693 F.2d at 1258. This standard of review is substantially different from the Knight v. State standard applied by the Florida Supreme Court in the instant case. As noted by the Jackson Court, Knight v. State, 394 So. 2d 997 (Fla. 1981) established a four-part test which requires:

> 'First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III [United States v. DeCoster, 624 F.2d 196 (D.C.Cir. 1979)]: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a

> defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established.'

437 So.2d at 149 (quoting Knight v. State, 394 So.2d at 1001 (footnote omitted)).

The Knight v. State standard is perhaps best described as the "outcome-determinative" standard of United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc) (DeCoster III). That test requires a petitioner to carry a burden of showing prejudice that is effectively insurmountable, insofar as a petitioner must demonstrate that the outcome of a proceeding, either in terms of a finding of guilt or innocence or in the determination whether the death penalty should be applied, has been affected by trial counsel's ineffectiveness. Noting that this burden is more substantial than the "cause and prejudice" formulation of Wainwright v. Sykes, 433 U.S. 72 (1977), the Eleventh Circuit reasoned in Washington v. Strickland:

> Application of the DeCoster rule may thus have the surprising result of holding a petitioner who has established a deprivation of his constitutional right to effective assistance of counsel to a greater showing of prejudice than if he was merely trying to present a claim of constitutional error not raised in the state courts.

693 F.2d at 1261 (emphasis in original) (footnote omitted).

The Eleventh Circuit expressly rejected the outcome-determinative test of DeCoster and Knight. 693 F.2d at 1261. Petitioner respectfully submits that, if the Washington v. Strickland standard of review were applied to the facts of the instant case, those facts, similar to Weidner v. Wainwright, clearly support actual and substantial prejudice sufficient for

reversal of the Petitioner's convictions and remand for a new trial.

This Court has not previously articulated the appropriate standard of review for ineffective assistance of counsel claims. That issue is presently before the Court in Washington v. Strickland. Oral argument on the matter is scheduled for 10 January 1984. Accordingly, CARL JACKSON requests that this Court grant jurisdiction in this cause to consider CARL JACKSON's Petition in conjunction with Washington v. Strickland and requests that the Court remand this cause to the Florida Supreme Court for reconsideration under the standard of review articulated by the United States Court of Appeals in that proceeding.

CONCLUSION

WHEREFORE, Petitioner CARL JACKSON respectfully prays that this Court issue a Writ of Certiorari to review the decision of the Supreme Court of Florida in this death penalty case.

Respectfully submitted,

LARRY G. TURNER
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904/375-4460
Counsel of Record

Office - Supreme Court, U.S.
FILED
NOV 29 1983
ALEXANDER L. STEVAS
CLERK

83-5840

CASE NO.: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL JACKSON,

Petitioner,

vs

THE STATE OF FLORIDA

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

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COUNSEL FOR PETITIONER

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF

The Petitioner, CARL JACKSON, respectfully moves this Court for leave to proceed in forma pauperis in the above-styled proceeding, and as grounds therefor states:

1. The Petitioner has filed with this Motion his PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA and APPENDIX thereto.

2. The facts showing that the Petitioner comes within the requirement to proceed in forma pauperis are presented in the PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS, which is attached hereto as Exhibit 1.

3. The Petitioner was charged and convicted of the offense of murder in the first degree (two counts) and other offenses and sentenced to death in Bay County, Florida in 1975. The Defendant was determined to be indigent at that time and was represented by the Public Defender. The Public Defender also represented the Defendant after conviction on appeal to the Florida Supreme Court.

4. The Defendant has been incarcerated at Florida State Prison since the date of conviction and continues to be without financial resources. The LAW OFFICES OF LARRY G. TURNER, P.A. and the LAW OFFICES OF WILLIAM B. SALMON have represented the Defendant before the trial Court in post-conviction proceedings without fee or expenses. The same law offices were appointed as appellate counsel to represent the Defendant in his appeal from the denial of his post-conviction motion. See Exhibit 2.

WHEREFORE, Petitioner CARL Jackson respectfully moves the Court for leave to proceed in forma pauperis in this certiorari proceeding.

Respectfully submitted,

LARRY G. TURNER
Post Office Box 508
Gainesville, Florida 32602
904/375-4460
Counsel of Record

STATEMENT OF MAILING

The undersigned, LARRY G. TURNER, having been duly sworn, deposes and states that he is a member of the Bar of the United States Supreme Court, and that PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF has, pursuant to Rule 28.2, Revised Rules of the Supreme Court of the United States, been deposited in a United States Post Office or mailbox in Gainesville, Florida, with first-class postage prepaid, properly addressed to the Clerk of the United States Supreme Court, within the time allowed for filing, and that to my knowledge the mailing took place on 29 November 1983.

LARRY G. TURNER

SWORN TO AND SUBSCRIBED before me this 29th day of November, 1983.

NOTARY PUBLIC

My Commission Expires:
Notary Public, State Of Florida At Large
My Commission Expires June 9, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO PROCEED IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF has been served upon David P. Gauldin, Assistant Attorney General, Department of Legal Affairs, The Capitol, 1502, Tallahassee, Florida 32301 by depositing said document in a United States Post Office or mailbox with first-class postage prepaid, this 29th day of November 1983.

LARRY G. TURNER
Post Office Box 508
Gainesville, Florida 32602
904/375-4460
Counsel of Record

UNITED STATES SUPREME COURT

OCTOBER 1983 TERM

CARL JACKSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

CASE NO. _____

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, CARL JACKSON, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the following information relating to my ability to pay the costs of prosecuting the petition for writ of certiorari are true:

1. I am not presently employed. I have been incarcerated since 1975.

2. I have not received, within the past twelve months, any income, whether from a business, profession or other form of self-employment or in the form of rental payments, interest, dividends or any other source.

3. I do not own any cash or checking or savings accounts.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement in this affidavit will

EXHIBIT 1

subject me to penalties for perjury.

CARL JACKSON

SUBSCRIBED AND SWORN TO BEFORE ME THIS 25th DAY OF

November, 1983.

Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES
BONDED THRU GENERAL

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY.

STATE OF FLORIDA,

Plaintiff

CASE NO. 75-258 CF

vs.

CARL JACKSON, [illegible]

Defendant.

O R D E R

On Motion of the Defendant, concurred in by Larry G. Turner and Bill Salmon, Attorneys, it is,

ORDERED and ADJUDGED that LARRY G. TURNER and BILL SALMON, Attorneys at Law, Gainesville, Florida are hereby appointed as appellate counsel to represent the Defendant in his appeal from a denial of his motion under Rule 3.850, RCrP, dated 31 December, 1980. The Attorneys have agreed, by telephone, to serve without compensation provided the State of Florida furnish, at no costs to the Defendant, a transcript of the hearing on the Rule 3.850 Motion, which condition was agreed to by the State Attorney, Fourteenth Judicial Circuit this date.

ORDERED at Panama City, Bay County, Florida, this 27th day of March, 1981.

W. Fred Turner

W. FRED TURNER, CIRCUIT JUDGE

Copies: State Attorney
Fourteenth Judicial Circuit

Hon. Larry G. Turner

Hon. Bill Salmon

Attorney General
State of Florida

EXHIBIT 2

83-5840

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FILED
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CLERK

CASE NO.: _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL JACKSON,

Petitioner,

vs

THE STATE OF FLORIDA

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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COUNSEL FOR PETITIONER

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3	AMENDMENT TO MOTION FOR POSTCONVICTION RELIEF
4	SECOND AMENDMENT TO DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF
5	ORDER
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9	ORDER DENYING MOTION FOR REHEARING
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	STATEMENT OF MAILING
	CERTIFICATE OF SERVICE

CD 439 US 1102 (79)

Carl JACKSON, Appellant,

v.

STATE of Florida, Appellee.

No. 48165.

Supreme Court of Florida.

March 9, 1978.

Rehearing Denied July 13, 1978.

Defendant was convicted by a jury in the Circuit Court, Bay County, Mercer P. Spear, J., of robbery, kidnapping, and two counts of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying defendant's motion for change of venue; (2) death penalty statute is constitutional; (3) three photographs of victims were admissible, even though gruesome, inasmuch as such photographs were relevant; (4) sheriff's statement on cross-examination by defense counsel that defendant had stated that he wanted a lawyer after he was advised of his *Miranda* rights and was warned that he was going to be asked questions regarding two murdered women was admissible; (5) defendant by voluntary seeking out law enforcement officer to make a statement after being fully advised of his rights on two occasions thereby waived protection afforded by *Miranda* with result that such statement was admissible, and (6) where there was a doubling up of aggravating circumstances but no mitigating circumstances, death sentence was upheld.

Judgment affirmed and death sentence upheld.

Hatchett, J., concurred specially with an opinion.

Boyd, J., concurred in part and dissented in part with an opinion.

1. Criminal Law ⇐126(1)

Test for determining change of venue is whether general state of mind of inhabitants of community is so infected by knowledge of incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try case solely upon evidence presented in courtroom.

2. Criminal Law ⇐126(2)

Where, in prosecution for two counts of first-degree murder, prospective jurors, when questioned, stated that they could decide issues between State and defendant based upon evidence heard and exhibits examined in courtroom, trial judge did not abuse his discretion in denying defendant's motion for change of venue, even though 22 of the prospective jurors examined admitted to having read about case or having heard about it on radio or television and nine prospective jurors knew one of victims or knew one or more of witnesses who would testify at trial.

3. Criminal Law ⇐1213

Death penalty statute is not unconstitutional. West's F.S.A. § 921.141.

4. Criminal Law ⇐438(1)

Fact that photographs are offensive to senses and might tend to inflame jury is insufficient by itself to constitute reversible error, but admission of such photographs must have some relevancy, either independently or as corroborative of other evidence.

5. Criminal Law ⇐438(7)

In prosecution for two counts of first-degree murder, three photographs of victims were admissible, even though gruesome, inasmuch as such photographs were relevant.

6. Criminal Law ⇐1169.1(10)

Gory and gruesome photographs admitted primarily to inflame jury will result in a reversal of conviction.

7. Criminal Law ⇐1171.5

Any comment upon a defendant's standing moot or silent or refusing to testify in face of an accusation is fundamental error requiring reversal for a new trial. U.S.C.A.Const. Amends. 5, 6.

8. Criminal Law ⇐1137(5)

Sheriff's statement on cross-examination by defense counsel that defendant had stated that he wanted a lawyer after being

EXHIBIT 1

advised of his *Miranda* rights and warned that he was going to be asked questions regarding two murdered women was properly admitted, even though defendant contended that sheriff's statement was impermissible comment upon defendant's exercise of his *Miranda* rights, inasmuch as but for insistence of defendant himself, fact would not have come before jury. U.S.C.A.Const. Amends. 5, 6.

9. Criminal Law ⇐1127(2)

A defendant cannot initiate error and then seek reversal based on that error.

10. Criminal Law ⇐412.2(5)

Defendant by voluntarily seeking law enforcement officer to make a statement, after being fully advised of his rights on two occasions, thereby waived protection afforded by *Miranda* with result that such statement was admissible, given fact that prior interrogation by police ceased once defendant requested an attorney and fact that defendant's decision to have an attorney was not irrevocable. U.S.C.A.Const. Amends. 5, 6.

11. Homicide ⇐354

Where, in prosecution for two counts of first-degree murder arising out of robbery and kidnapping, trial court in written findings upon which death sentence was based doubled up aggravating circumstances by considering as a separate aggravating circumstance fact that murder of one victim was committed for pecuniary gain while defendant was engaged in commission of robbery but there were no mitigating circumstances, death sentence was upheld. West's F.S.A. §§ 921.141(5), (5)(d, f), (6).

Louis G. Carres, Asst. Public Defender, Tallahassee, for appellant.

Robert L. Shevin, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant, Carl Jackson, was convicted on two counts of murder in the first degree.[1] The jury recommended and the trial judge imposed a sentence of death. Jurisdiction vests in this court pursuant to Article V, Section 3(b)(1), Florida Constitution. We affirm the conviction and sentence.

On Sunday morning, April 20, 1975, Ann Patterson Butler was found shot in the head behind the counter of the Jr. Food Store in Bay County, Florida. A short time later, the corpse of Mary Frances Price was found in the front seat of a Chrysler automobile parked in a cemetery a short distance away. There were no witnesses to the actual killings. The following facts were adduced at trial:

On the morning of April 20, 1975, Jimmy Harris, an acquaintance of Jackson's, stopped by appellant's apartment to collect a debt. Appellant asked Harris to drive him to a friend's house to pick up the money. Instead of directing Harris to the other person's house, however, Jackson, with a gun in his belt, told Harris to stop at a Jr. Food Store. He then got out of the car and ordered Harris to drive around the block, return, and pick him up. Harris drove away but did not return. Later that day, after hearing that the Jr. Food Store had been robbed, Harris went to the police and related the above information concerning appellant's earlier activities.

That same morning, Mr. and Mrs. Price stopped at the Jr. Food Store on their way to church. Mrs. Price waited in the car while Mr. Price went into the store. The keys to the car remained in the ignition. When Mr. Price entered the store, he turned left, away from the counter, and walked to the far corner of the building. After finding the item he wished to purchase, he approached the counter where he found Mrs. Butler, the sales clerk, lying on the floor in a pool of blood. He immediately telephoned the police and then looked out the front door and discovered that his wife and his car were missing. Both were found in a cemetery a few blocks away from the Jr. Food Store. Mrs. Price had been shot in the head at close range.

During the course of the investigation, appellant's jacket was discovered in the woods a few feet from the abandoned car.

1. Appellant was also convicted of robbery and kidnapping for which he received the following sentences: life imprisonment on the robbery charge and 15 years on the kidnapping charge.

His girlfriend testified that he was wearing the jacket when he left their apartment on Sunday morning and returned later that day without it. Another witness testified that shortly after the robbery had taken place he saw appellant in the vicinity walking along the road and stopped to offer him a ride. Once inside the vehicle, appellant asked the witness if he had heard about the murder in the cemetery. Mrs. Price had not at this time been found. In addition, appellant's fingerprints were found on a package of cigarettes in the front seat of the Prices' car.

The evidence against appellant, though circumstantial, was strong.

[1, 2] Appellant raises five points on appeal. First, he argues that the trial court erred in denying his motion for change of venue. It is his contention that, due to pretrial publicity, it was impossible for him to receive a fair and impartial trial in Bay County. Twenty-two of the prospective jurors examined admitted to having read about the case or having heard about it on the radio or television. Nine prospective jurors knew one of the victims or knew one or more of the witnesses who would testify at trial. This issue is governed by the test stated in *Kelley v. State*, 212 So.2d 27 (Fla.2d DCA 1968), which we adopted in *McCaskill v. State*, 344 So.2d 1276, Opinion filed April 7, 1977:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. *Singer v. State* (Fla.1969) 109 So.2d 7; *Collins v. State* (Fla.App.1967) 197 So.2d 574, and cases cited therein. *Kelley v. State*, 212 So.2d at 28.

The prospective jurors, when questioned, stated that they could decide the issues between the state and the appellant based upon the evidence heard and the exhibits examined in the courtroom. We find nothing in the record to indicate that the trial judge abused his discretion in denying appellant's motion for change of venue.

[3] In appellant's second point he attacks the constitutionality of Florida's death penalty. Similar attacks were rejected by this court in *State v. Dixon*, 283 So.2d 1 (Fla.1973), and by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). These cases are dispositive of this issue.

[4-6] Appellant's third point involves the admission into evidence of three photographs taken of the victims and admitted over appellant's objections. It is appellant's contention that these pictures were unnecessary and served only to inflame the passions of the jury. Indeed, the pictures complained of are gruesome. However, as we stated in *Young v. State*, 234 So.2d 341 (Fla.1970):

> The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs must have some relevancy, either independently or as corroborative of other evidence. (footnotes omitted)

And again, in *State v. Wright*, 265 So.2d 361 (Fla.1972):

> [T]he current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative", or "whether photographed away from the scene," are routine issues basic to a determination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

See also *Bauldree v. State*, 284 So.2d 196 (Fla.1973), and *Swan v. State*, 322 So.2d 485 (Fla.1975). Applying this test of admissibility to this case, we hold that the photographs were relevant and that no error was committed in admitting them into evidence. However, we again caution the prosecutors of this state that gory and gruesome photographs admitted primarily to inflame the

jury will result in a reversal of the conviction.

[7-9] Appellant also challenges the admission of certain statements elicited at trial regarding the exercise of his *Miranda* rights. The Bay County Sheriff was sworn as a witness for the state and related the following facts: Upon arrest, appellant was advised of his constitutional rights pursuant to the procedure outlined in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), after which he discussed his whereabouts on the morning of the murders and described the clothing he was wearing on that date. The sheriff then warned Jackson that he was going to ask him questions regarding the two women who were murdered, whereupon the defendant stated, "I want a lawyer." It is appellant's contention that the sheriff's statement constitutes an impermissible comment upon appellant's exercise of his rights under the Fifth and Sixth Amendments to the United States Constitution. Appellant correctly states our holding in *Bennett v. State*, 316 So.2d 41 (Fla.1975), that any comment upon a defendant's standing mute or silent or refusing to testify in the face of an accusation is fundamental error requiring reversal for a new trial. But this is not a *Bennett* situation. In *Bennett* the *prosecutor* elicited testimony from his own witness to the effect that after being advised of his constitutional rights, defendant "refused to sign the waiver . . ." This statement suggests that defendant had a duty to respond and was held to be an impermissible comment on defendant's exercise of his Fifth Amendment rights. In the present case, the appellant's statement, "I want a lawyer" was brought out on cross-examination by counsel for the defense.[2] But for the insistence of appellant

2. Q All right, Sheriff, at this point did you show the defendant, this defendant, Carl Jackson, this is the defendant that you were talking to, right here? (Indicating.)
A Yes, sir.
Q Did you show Carl Jackson anything?
A Yes, sir.
Q All right, I show you State's Exhibit Number One for identification and ask you if you can identify that?
A Yes, sir, this is a brown jacket which I took out of a bag and handed it toward Carl Jackson, and he said—I said, "Is this your jacket?" And he said, "That's my jacket."
Q If the Court please, we move to introduce the jacket as State's Exhibit Number One for identification into evidence.
THE COURT: Do you desire to cross examine the witness?
MRS. COSTELLO: One moment, Your Honor.
THE COURT: Well, the Court will withhold ruling until the defendant has had the opportunity to cross examine the witness.
MR. JONES: You may inquire.
CROSS EXAMINATION BY MRS. COSTELLO:
Q How do you know this is the jacket that you showed Carl Jackson?
THE WITNESS:
A I initialed it, and the date, right here. Here are my initials and the date. (Indicating.)
Q Okay, and you put those on at that time?
A Yes, Ma'am.
Q Mr. Jackson said that was his jacket?
A Yes, Ma'am.
Q He had previously denied having a jacket, is that correct?
A Yes.
Q That was not in question and answer form, was it?
A Repeat that, please, Ma'am.
Q Sheriff, you just read the statement to the jury you say you took from Mr. Jackson. They were in question and answer form, is that correct?
A Yes.
Q And in that statement Mr. Jackson denied having a jacket, is that correct?
A There's two situations. He said he was wearing a jacket on one question in this statement, and then another one he said he wasn't wearing a jacket.
Q All right. Why wasn't this oral statement taken down and recorded by the stenographer?
A It was.
Q Not in question and answer form, was it?
A This—
Q The part where you say he admits that's his jacket, that particular jacket?
A I see what you're getting at. When I asked—he answered the question, "Why are you trying to say something?" And the question, it wasn't really a question, it was a statement, "I want to talk to you about those two women that were murdered."
Q At that point, that was the period where the stenographer stopped taking down questions and answers in that form, is that correct?
A Right. I reached down, there was a bag sitting at my feet, between Mr. Jackson and myself. I reached down and pulled this jacket out of the bag and handed it toward him, unfolded it, and said, "Is this your jacket?"
Q I understand that was your statement.

himself, the fact would not have come before the jury. Appellant cannot initiate error and then seek reversal based on that error. *Gagnon v. State*, 212 So.2d 337 (Fla.3d DCA 1968); *Borst v. Gale*, 99 Fla. 376, 126 So. 290 (1930).

[10] Later that evening, after appellant had informed the sheriff that he wished to speak to a lawyer, but before a lawyer was summoned, appellant asked to speak to the chief investigator concerning the charges against him. At this time, appellant was again advised of his rights, whereupon he proceeded to make a statement. Although appellant denied any involvement in the murders for which he was later tried, the substance of the statement was damaging because it was inconsistent with prior statements. Appellant contends that the trial court erred in admitting the statement into evidence. We find no authority to uphold his position. There is nothing in the record to indicate that the interrogation by the sheriff did not cease once appellant requested an attorney. The decision to have a lawyer is not irrevocable. If the evidence shows, as it does in this case, that a defendant voluntarily seeks out a law enforcement officer to make a statement, after being fully advised of his rights on two occasions, he may do so, thereby waiving the protection afforded by *Miranda*. See *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), wherein the United States Supreme Court held that a statement given by defendant to an investigating officer was admissible even though the defendant had asserted his right to remain silent during an earlier interrogation that same day.

Having determined that no reversible error has been made to appear which would require a new trial, we proceed to examine the sentence imposed.

[11] In the trial court's written findings,[3] upon which the sentence of death was based, the Court considered as a separate aggravating circumstance the fact that the murder of Mrs. Butler was committed for

MR. JONES: Let the sheriff finish his explanation.

MRS. COSTELLO: I don't think he's responding to the question.

THE COURT: Go ahead and proceed.

THE WITNESS:

A What do you want me to do now?

(Laughter.)

THE COURT: Ladies and gentlemen, we are very happy to have all of you here in court. This is your court. You have a perfect legal right to be here. We want you here to see your court in operation. A man is on trial for his life here today. This is a very serious matter. There's nothing funny about it. Now, this is several times that we've had to have order in the courtroom. We do not wish to clear the courtroom. We wish to have you here so that you may see your court in operation. But, you must realize this. You must conduct yourselves accordingly. You may proceed.

MRS. COSTELLO: Thank you, Your Honor. Sheriff, I would just like for you to explain why the form that you had previously followed, asking questions and receiving responses that were recorded by the stenographer, why that was stopped.

THE WITNESS:

A The statement says—

Q Sheriff, I don't think—

THE COURT: Let him finish his answer.

THE WITNESS:

A I'm just reading the statement. The statement says—the suspect, at this point, said he didn't know anything about what we were talking about. At this point I pulled the jacket out. I said—at this point I pulled out a tan jacket from the bag and unfolded it and asked if that was his jacket. The suspect said it was, and I asked him where he left it and he said that he left it in the car. At this point, he said, "I want a lawyer."

3. The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in Subsection (5) of Section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravation circumstances. The aggravating circumstances found by the Court are as follows:

1. The murder of ANN PATTERSON BUTLER was committed while the Defendant was engaged in commission of a robbery.

2. The murder of ANN PATTERSON BUTLER was committed for pecuniary gain.

3. The murder of MARY FRANCES PRICE was committed while the Defendant was engaged in flight after committing a robbery.

4. The murder of MARY FRANCES PRICE was committed while the Defendant was engaged in the commission of the crime of kidnapping.

5. It is the Court's opinion, from the evidence, that both of the aforesaid capital felonies were committed for the additional purpose of avoiding a lawful arrest.

pecuniary gain [Section 921.141(5)(f), Florida Statutes (1973)] while appellant was engaged in the commission of a robbery [Section 921.141(5)(d), Florida Statutes (1973)]. We have held that this procedure constitutes error, at least where mitigating circumstances are present. *Provence v. State*, 337 So.2d 783 (Fla.1976). Where there is a doubling up of aggravating circumstances, but no mitigating circumstances, as is the case here, a sentence of death may be upheld. *Elledge v. State*, 346 So.2d 998 (Fla. 1977).

Accordingly, the judgment is affirmed and the sentence of death upheld.

It is so ordered.

OVERTON, C. J., and ADKINS, ENGLAND, SUNDBERG and KARL, JJ., concur.

HATCHETT, J., concurs specially with an opinion.

BOYD, J., concurs in part and dissents in part with an opinion.

HATCHETT, Justice, concurring specially.

In *Spenkelink v. State*, 350 So.2d 85 (Fla. 1977), I expressed by belief that Section 921.141, Florida Statutes (1973), is unconstitutional on its face and as applied. Both the United States Supreme Court and this Court have held otherwise. I see no purpose to be served by reiterating my views in future cases where the death penalty is imposed.

BOYD, Justice, concurring in part, dissenting in part.

I concur in affirmance of the judgment of guilt. I dissent to upholding the sentence because of the improper doubling of the aggravating circumstances. *Provence v. State*, 337 So.2d 783 (Fla.1976).

In a case where the stakes, life or death, are so great, I cannot treat that mistake as lightly as does the majority. I do not read *Elledge v. State*, 346 So.2d 998 (Fla.1977), to hold otherwise. The existence of unknown mitigating circumstances in *Elledge* and the finding of none by the trial judge here is not a sufficient basis, to my mind, for not applying the *Elledge* reasoning. The following, from *Elledge*, summarizes my view,

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case for a new sentencing trial at which the [impermissible factor] will not be considered. *Elledge*, at 1002.

I would vacate the sentence of death and remand for a new sentencing proceeding.

In re Petition of POST-NEWSWEEK STATIONS, FLORIDA, INC., for change in code of judicial conduct.

No. 46835.

Supreme Court of Florida.

July 5, 1978.

On consideration of the Motion for Rehearing [of Fla.App., 358 So.2d 1360] and Alternative Motion for Expedited Proceedings filed by Petitioner, POST-NEWSWEEK STATIONS, FLORIDA, INC., and the Petition for Rehearing filed by SUNBEAM TELEVISION CORPORATION,

IT IS ORDERED by the Court that said Motion and Petition be and the same are hereby denied.

ENGLAND, C. J., and OVERTON, HATCHETT and ALDERMAN, JJ., concur.

SUNDBERG, J., concurs specially with an opinion with which ENGLAND, C. J., concurs.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR PANAMA CITY, BAY COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO: 75-258-CF

vs.

CARL JACKSON,

Defendant.

MOTION FOR POST CONVICTION RELIEF

COMES NOW the Defendant, CARL JACKSON, by and through his undersigned attorney and respectfully requests this Court to enter its Order granting the Post-Conviction Relief sought herein. The Defendant would show that:

1. The Judgments sought to be reviewed herein are convictions for the crimes of: Robbery, Count I, Sentence - Life in Prison; Murder in the First Degree, Count II, Ann Patterson Butler (victim), sentence - death; Kidnapping, Count III, Mary Frances Price (victim), sentence - fifteen years; Murder in the First Degree, Count IV, Mary Frances Price (victim), sentence - death.

2. The above-mentioned sentences were imposed by the Honorable Mercer P. Spear, Circuit Judge of the Fourteenth Judicial Circuit of the State of Florida in and for Panama City, Bay County, Florida.

3. That there was an appeal taken to the Supreme Court of Florida wherein the convictions and sentences were upheld. Petition to the Supreme Court of the United States for certiorari was denied.

4. There has been no previous motion for post-conviction relief filed in this cause.

As grounds for the relief sought, the Defendant would show:

A. Ground I - That the Defendant, convicted and sentenced for above-mentioned crimes, was denied his right to due process

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and right to counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Supporting facts: The Defendant, upon his arrest after having spoken briefly with arresting officers exercised his constitutional rights by requesting the presence of a lawyer. Lawyers from the Public Defender's Office for the Fourteenth Judicial Circuit arrived at the Bay County jail and requested and demanded access to the Defendant to speak with their client. The request and demand of the Public Defenders to see and speak with the Defendant were denied by arresting officers and the Bay County Sheriff's Department. The Defendant was denied access to his constitutionally guaranteed attorney until approximately 11 hours after the Defendant requested an attorney. The booking officer for the Bay County Sheriff's Office failed to inform the Defendant that if he was unable to retain a lawyer, one would be immediately provided at no charge and further failed to immediately and effectively place the Defendant in communication with the Office of the Public Defender for the Fourteenth Judicial Circuit. Further denied the Public Defender for the Fourteenth Judicial Circuit access to the Defendant in violation of Rule 3.111, Florida Rules of Criminal Procedure.

B. Ground II - That the trial court's denial of the Defendant's Motion for Change of Venue was an error by the trial court, extremely harmful and prejudicial to the Defendant in violation of his constitutionally guaranteed rights under the Fifth, Sixth and Fourteenth Amendment to the United States Constitution.

Supporting facts: Counsel for Defendant presented the Defendant's Motion for Change of Venue and supporting Affidavits from all but one county of the Fourteenth Judicial Circuit, verifying the inability of the Defendant to receive a fair trial within the Fourteenth Judicial Circuit. This cause was accompanied by massive and prejudicial pre-trial publicity in that:

(1) A massive and widespread manhunt was conducted for suspects in this cause by agents from the Bay County Sheriff's Department, Panama City Police Department, Florida Game and Fresh Water Fish Commission, Marine Patrol, Agricultural Department, and other such official departments as well as citizen groups organized to assist in said manhunt.

(2) Widespread media coverage including two television stations, WJHG-TV and WDTB-TV showing film of the Defendant, Carl Jackson, in the custody of the Sheriff of Bay County being transferred to the Bay County Courthouse for his First Appearance. Said picture showed the Defendant handcuffed and surrounded by Sheriff's Deputies and other law enforcement officials. Said television broadcasts were extended to other counties within the Fourteenth Judicial Circuit.

(3) The Panama City News Herald published articles with headlines indicating the Defendant was involved in satanic activities. In addition there were several other pre-trial newspaper articles which worked to the detriment of the Defendant's right to receive a fair trial within the Fourteenth Judicial Circuit.

(4) Radio Stations WDLP, WPFM and WGNE broadcasted regularly and repeatedly prejudicial and unsworn information concerning this case.

(5) Rumor, gossip, hearsay and other unsworn information was spread by word-of-mouth throughout the citizenry of the Fourteenth Judicial Circuit as evidenced by Affidavits accompanying the Defendant's Motion for Change of Venue.

(6) Further, the pardon of Pitts and Lee was handed down during the week of trial in this cause further inflaming the pre-trial prejudice to the Defendant in this cause.

C. Ground III - The Defendant suffered fundamental and prejudicial error by way of the impermissible comment on the Defendant's rights protected under the Fifth and Sixth Amendments to the Constitution of the United States.

Supporting Facts: During direct testimony of a State's Witness (Bay County Sheriff Easterling), said witness, without solicitation by the Defendant, testified that the Defendant stated, "I want a lawyer.", after being questioned by law enforcement authorities.

D. Ground IV - That the Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were prejudiced by the admittance into evidence of a gruesome and inflamatory photograph which had no relevance to any issue in the case, and merely inflamed the passions and prejudices of the jury against the Defendant.

Supporting facts: A picture of the victim (State's exhibit # fourteen) which the trial court had ruled was inflamatory was introduced, over objection of the Defendant, into evidence without the requisite showing of its relevance, by the State, to some issue in the case. Further, the Court denied a mistrial requested by the Defendant of this same ground.

E. Ground V - That the Defendant suffered violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution by improper and prejudicial remarks by the prosecutor throughout the trial and during closing srguments.

Supporting facts: The record is innundated by actions and comments of the prosecutor to the prejudice of the Defendant's rights of due process and a fair trial including, but not limited to:

(1) Improper leading questions

(2) Ignoring the trial court's sustaining of Defendant's objections to improper and leading questions

(3) Improper repitition and emphasis of state-witnesses' answers

(4) Misstatements of the facts and the law in this cause

F. Ground VI - That the Defendant's rights as guaranteed by the decision in Miranda v Arizona, 384 U.S. 436 (1966), were violated, notwithstanding the fact that the Defendant orally

waived those rights.

Supporting facts: The Defendant had exercised his constitutional right to remain silent and have assistance of counsel at the time of arrest and this right was not waived by an intervening period of time in excess of ten (10) hours, with the consequent psychological pressure to talk and denial of opportunity to confer with counsel, at the end of which the Defendant asked to speak to a law enforcement investigator and made inconsistent and thereby incriminating statements.

G. Ground VII - That the Defendant's conviction and sentence were imposed, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, by a jury selected through procedures that systematically excluded from jury service persons having scruples against the death penalty, in violation of Witherspoon v Illinois, 391 U.S. 510. Said exclusion worked to the Defendant's detriment in both the guilt phase and penalty phase of this case.

Supporting Facts: The record is replete with instances of denial of the Witherspoon principles, for example: On pages 273 through 274 of the Transcript, Mr. Powell is excused for cause by the state, without instruction by the State or Court as to the Witherspoon principles and over the attempted objection of the Defendant for the failure of both the State and the Trial Court.

H. Ground VIII - The Defendant was denied his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution for failure to have and failure of defense counsel to request that seperate juries be selected for the guilt phase and penalty phase or in the alternative, that jurors unable to impose the death penalty be excused at the time, if necessary, of the penalty phase.

Supporting facts: The record is void of any such request. Excusing jurors opposed to the death penalty from the guilt phase denies the Defendant his rights under the Sixth and Fourteenth Amendments to the United States Constitution and his right to a representative jury. A death qualified jury has been shown

to be more likely to find guilt than is a jury chosen without regard to Witherspoon scruples.

I. Ground IX - The death sentence imposed on the Defendant violates his right to due process and equal protection in that it was imposed pursuant to a pattern and practice of racial discrimination in capital sentencing.

Supporting facts: The death penalty discriminates against black people and in favor of white people. Fifty percent of Florida's murder victims are white, yet their killers comprise ninety-five percent of Florida's "death row." No white person has ever received the death penalty for killing a black person. The death penalty in Florida is far more likely to be imposed in "black on white" homicide cases than in any other racial mixture of victim-defendant.

J. Ground X - That the Defendant's fundamental rights were denied at time of sentencing in the following ways:

(1) Improper doubling of aggravating circumstances in that the Trial Court found the killing of Ann Patterson Butler to have occurred both, "during the commission of a felony" and "for pecuniary gain."

(2) Improper combining of aggravating circumstances in that the Trial Court considered the aggravating circumstances of both homocides in outweighing the mitigating circumstances when the Court should have considered the circumstances of both cases separately.

(3) Improper consideration and inclusion of the aggravating circumstance of "avoiding lawful arrest."

(4) Failure of the Trial Court to properly weigh the mitigating circumstance of the Defendant having "no significant prior criminal history." Failure of the Trial Court to give proper consideration to all mitigation in that the Court did not order or consider a presentence investigation which would have revealed a significant, exemplary and heavy mitigating factor of outstanding military service. Failure of the Trial Court to give well reasoned

consideration to the imposition of sentence in the first degree murder case.

(5) Improper, innaccurate and prejudicial comments of the prosecutor during the penalty phase of this cause.

Supporting fact: The prosecutor told the jury that since the life sentence penalty for murder is identical to the life sentence penalty for robbery, robbers ought to go ahead and murder their victims. The prosecutors innaccurate statement that when someone is murdered in cold blood the penalty shall be death unless there is strong mitigation. The prosecutors statement that he could find no mitigation in this case. The Trial Court's failure to correct the innaccurate, misleading and prejudicial comments of the prosecutor.

WHEREFORE, the Defendant respectfully requests this Honorable Court to Vacate and Set Aside the Verdict in this cause, Grant a New Trial, Correct the Sentence of grant other relief as deemed appropriate.

WE HEREBY CERTIFY, that a true copy of the foregoing has been delivered to the Office of the State Attorney for the Fourteenth Judicial Circuit, Bay County Courthouse, Panama City, Florida, by Mail, this 18th day of March, 1980.

Respectfully Submitted,

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IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR PANAMA CITY, BAY COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

vs.

CARL JACKSON,

Defendant.

CASE NO: 75-258-CF

AMENDMENT TO MOTION FOR POST-CONVICTION RELIEF

COMES NOW, the Defendant, CARL JACKSON, by and through his undersigned Attorneys and enters this Amendment to his initial Motion for Post-Convication Relief filed in this Court on March 18, 1980, and says:

1. That the Defendant realleges and incorporates by reference each and every allegation of his Motion for Post-Conviction Relief filed in this Court on March 18, 1980.

2. The Defendant was denied the effective assistance of Counsel at the trial phase, sentencing phase, and on appeal in this cause. Facts supporting this allegation are as follows:

a. The Defendant's Court-Appointed Counsel, Deedee S. Costello, Assistant Public Defender, had been practicing criminal law in Panama City for only a few months at the time of the Defendant's trial. Defendant's case was Ms. Costello's first capital offense trial and did not have the requisite experience or assistance to afford the Defendant effective assistance of Counsel at his First-degree murder trial.

b. The lack of experience of Defendant's Court-Appointed Counsel which resulted in the Defendant being denied the effective assistance Counsel was evidenced by her failure to investigate and/or depose witnesses concerning the f[illegible] and circ[illegible]tances of the Defendant's arrest and the search and seizure of his residence. Further, Defendant's Court Appointed-Counsel filed no pretrial Motions attacking the sufficiency of Defendant's arrest, legality of the search and seizure of Defendant's home, or the legality of statements obtained from Defendant, due to the Defendant being denied counsel.

EXHIBIT 3

c. Defendant's Court-Appointed Counsel failed to conduct a poll of the citizenry of the Fourteenth Judicial Circuit, which poll would have shown conclusively the bias and prejudice which was present in the Fourteenth Judicial Circuit sufficient to deny the Defendant a fair trial.

d. The Defendant's Court-Appointed Counsel failed to raise any challenges to the composition of the Grand Jury returning the indictments in this cause or to the venire from which the petit jury was selected to try the Defendant in this cause.

e. Defendant's Court-Appointed Counsel failed to adequately prepare and present the Defendant's Motion for Change of Venue. From the record it appears that no formal pre-trial Motion was heard on the Defendant's Motion for Change of Venue nor were any supporting witnesses presented by the Defendant's Court-Appointed Counsel at the time of trial to show the extreme prejudice and bias existing in Bay County against the Defendant at the time of his trial.

f. The Defendant's Court-Appointed Counsel took the deposition of only one witness, Jimmy Harris. Failure to take deposition of all State witnesses denied the Defendant the opportunity to preserve statements and adequately prepare for cross-examination during trial.

g. Defendant's Court-Appointed Counsel failed to raise numerous objections, during voir dire, directed at challenges for cause made by the State Attorney in violation of the principle stated in Witherspoon v. Illinois, 391 U.S. 510 (1968).

h. Counsel failed, during voir dire, to raise numerous objections to extremely prejudicial statements elicited by the State Attorney of prospective jurors. Such prejudicial statements tainted the entire venire panel to the prejudice of the Defendant and in derigation of his right to a fair trial. Defendant's Court-Appointed Counsel failed to request a mistrial or in the alternative to have the entire voir dire panel struck because of prejudicial statements elicited from prospective jurors which denied the Defendant his right to due process and a fair trial. Further, Defendant's Court-Appointed

Counsel failed to ask for in camera and individual voir dire of prospective jurors in order to preserve the integrity of the voir dire panel and prevent undue prejudice to the Defendant's right to a fair trial.

i. Defendant's Court-Appointed Counsel failed to adequately question any of the prospective jurors during voir dire on matters of: prejudices and pre-conceived notions of the Defendant's guilt as a result of the massive pretrial publicity in this cause; racial prejudice in view of the fact that the Defendant is black, the victims were white and Panama City is a predominantly white community with strong prejudices against black people; personal knowledge by perspective jurors of the two victims who were prominant in the Panama City Community; basic principles of law such as presumption of innocence, burden of proof, circumstancial evidence and other guarantees to preserve a Defendant's right to a fair trial.

j. Counsel failed to attempt to rehabilitate numerous jurors excused for cause based on a simple affirmative response to the State Attorney's leading and conclusionary question that under no circumstances could they vote to impose the death penalty, and further asked no questions to properly present the Witherspoon principle to prospective jurors.

k. Defendant's Court-Appointed Counsel failed during voir dire to probe into any areas covered by the Prosecutor with leading and conclusionary statements and further failed to conduct an adequate voir dire in a first-degree murder case involving the possibility of the imposition of the ultimate penalty, death, against the Defendant.

l. That Defendant's Court-Appointed Counsel Counsel failed to object to the Court's excusing Juror Ramsey for a cause and failed to attempt to rehabilitate said juror.

m. The Defendant's Court-Appointed Counsel failed to object or attempt to rehabilitate the unidentified juror excused for cause on Page 207 of the Court's transcript in view of the uncertainty of that Juror's response to the Prosecutor's questioning.

n. The Defendant's Court-Appointed Counsel failed to have Juror Peters excused for cause upon his admission that he would infer guilt from the fact that the indictment had been filed against the Defendant.

o. That the Defendant's Court-Appointed Counsel failed to object or attempt to rehabilitate Jurors Taylor and Senna upon the unrequested challenge for cause entered by the Court.

p. The Defendant's Court-Appointed Counsel's failure to move for additional preemptory challenges in view of the bias and prejudice present in the venire panel, and due to the seriousness of the charge.

q. The Defendant's Court-Appointed Counsel failed to object to prejudicial comments of the Prosecutor and improper comments on the Defendant's right to remain silent by the Prosecutor during the opening argument.

r. The Defendant's Court-Appointed Counsel failure to object to the wholly improper, impermissible and prejudical opening argument presented by the Prosecutor.

s. The failure of the Defendant's Court-Appointed Counsel to object to the leading, improper and prejudicial identification of the Defendant elicited from Jimmy Ray Harris by the Prosecutor. Jimmy Ray Harris did not know the Defendant's name and had seen the Defendant only one time prior to the incident in this cause.

t. The failure of the Defendant's Court-Appointed Counsel to object to the inadmissible testimony of Officer Hillbourne in relating that specks and darks areas in photographs of victim Patterson, presented to him by the Prosecutor, were blood, in that Officer Hillbourne was never and is not an expert in the field of serology and provided no other basis for his knowing that these specks and dark areas were blood (Pages 368 and 395 of transcript).

u. The failure of Defendant's Court-Appoint Counsel to object to the admission of testimony concerning a footprint found at the scene of victim Price's murder without the proper predicate being made to establish the reliability of this testimony and its probative value.

v. Failure of Defendant's Court-Appointed Counsel to object to the leading and prejudicial question to Witness Jacquelyn Williamson with respect to her identification of the Defendant (Page 479).

w. Failure of the Defendant's Court-Appointed Counsel to object and request a mistrial due to the Prosecutor's constant and prejudicial referral to a jacket being the Defendant's in face of the trial Court's sustaining Defendant's objection's to the Prosecutor's referrals and that the jacket had not been proven to be the Defendant's (Page 504-505).

x. Failure of the Defendant's Court-Appointed Counsel to depose the fingerprint witnesses, William Sellers and Jack Duncan, to adequately prepare for the examination as to said witnesses and the reliability, qualification, relevancy and admissibility of their testimony. Defendant's Court-Appointed Counsel further failed to examine the exhibits to be used by said witnesses in their testimony and determine the necessary predicates, relevance, materiality, and admissibility of said exhibits. The failure of Defendant's Court-Appointed Counsel to depose and examine the testimony and exhibits to be introduced by said fingerprint witnesses resulted in the admission of the fingerprint identification of the Defendant at the scene of the crime when in fact the inked fingerprint card allegedly containing the known fingerprint of the Defendant was unmarked and incapable of being so identified at trial by the fingerprint witnesses. Said fingerprint identification was the only testimony of Defendant's presence at the scene of the murder of Victim Price introduced at the Defendant's trial. The Defendant's Court-Appointed Counsel further failed to request a mistrial as a result of the admission of the overwhelmingly prejudicial fingerprint evidence.

y. The failure of Defendant's Court-Appointed Counsel to depose Witness Easterling and to properly cross-examine him during the initial profer of Witness Easterling's testimony as to the sufficiency of Witness Easterling's advising the Defendant of his constitutional rights, under U.S. v. Miranda, prior to asking

any questions of the Defendant. Counsel's failure to determine if Witness Easterling determined if the Defendant could adequately read and understand the form allegedly signed by the Defendant waiving his rights. Counsel's failure to object to the admission, even during profer, of any statement made by the Defendant due to the failure of Witness Easterling to properly advise the Defendant of his constitutional rights under U.S. v. Miranda in that Witness Easterling failed to advise the Defendant that he could cease questioning at any time he desired. Said failures resulted in the admission of grossly damaging and prejudicial statements of the Defendant when in fact such statements were wholly inadmissible.

z. Failure of Defendant's Court-Appointed Counsel to adequately investigate the circumstances surrounding the Defendant's arrest and custodial interrogation which where oppressive and denied the Defendant his right to Counsel. Further the Defendant's Court-Appointed Counsel failed to have the Defendant take the stand during the profer to determine the admissibility of statements obtained from the Defendant and thereby denied the Defendant his most effective opportunity to show the illegality of statements obtained and have them suppressed.

aa. The failure of Defendant's Court-Appointed Counsel to object and move for suppression of statements of the Defendant admitting to ownership of a jacket allegedly worn by the Defendant during the commission of the crimes involved in this case, based on Witness Easterling's testimony during his profer that the Defendant requested a lawyer and desired a cease-questioning at the point Witness Easterling told the Defendant he wanted to talk with him about the two women that were murdered, rather than after the production of the jacket and the Defendant's statement that the jacket was his.

bb. Failure of Defendant's Court-Appointed Counsel to object to the testimony of Witness Easterling, werein he states, in response to the Prosecutor's question concerning his identification of the jacket, that he cannot find his initials and therefore cannot identify the jacket (Page 561).

cc. The failure of Defendant's Court-Appointed Counsel to depose or subpoena for trial the person who allegedly transcribed the question and answer session between Witness Easterling and the Defendant to determine its accuracy, relevancy, veracity, and admissibility. Also, Counsel's failure in allowing Witness Easterling to read an alleged question and answer statement between himself and the Defendant, not taken or transcribed by Witness Easterling, without first demanding that the State call the person who allegedly took the statement, and laying the proper predicate for admission of the statement or its reading.

dd. Failure of Defendant's Court-Appointed Counsel to object to Witness Easterling's impermissible reference to the Defendant's right to remain silent and further, to request a mistrial (Page 577).

ee. Failure of Defendant's Court-Appointed Counsel to object to the testimony of Witness Bill Lewis. Objections based on denial of the Defendant's right to Counsel in that he had previously asked for an attorney and one had not been provided nor had the Defendant ever been allowed to see his Counsel, failure to inform the Defendant of his Constitutional rights, initiation of questions by Witness Lewis after the Defendant had previously asked for an attorney, heresay testimony of an alleged request of Defendant to speak with Officer Sellers, made through a jailer who did not testify, all to the prejudice and denial of the Defendant's constitutionally protected rights.

ff. Failure of Defendant's Court-Appointed Counsel to make a substantial Motion for judgement of acquittal based on the insufficiency of the circumstantial evidence presented by the State and insufficiency of the evidence, had the Defendant moved for exclusion of certain evidence such as fingerprint identification and statements obtained from the Defendant.

gg. The failure of Defendant's Court-Appointed Counsel to mount an effective closing argument on behalf of the Defendant based on the lack of any substantial evidence against the Defendant and the concessions, by Counsel, of damaging evidence against the Defendant

such as the Defendant's fingerprint being present in the murder vehicle, the jacket mentioned during the testimony being the Defendant's, and the Defendant's having personal involvement in this incident as the reason why the Defendant did not take the stand and testify in his own behalf.

hh. Failure of Defendant's Court-Appointed Counsel to object to improper and prejudicial remarks of the Prosecutor during closing argument. (See transcript of prosecutor's argument as a whole.)

ii. Failure of Defendant's Court-Appointed Counsel to object to innumerable prejudicial dogmatic statements of the Prosecutor as to what the evidence proved. Also, Counsel's failure to object to arguments made by the Prosecutor based on matters outside the evidence presented. Examples of impermissible and prejudicial misstatements by the Prosecutor are found, among others, on the following pages in the transcript in this cause: Page 640, 641, 647, 651, 652, 656, 657, 658, 659, 660, 665, 666, 667, 668, 669, and 670.

jj. Failure of Defendant's Court-Appointed Counsel to raise objections to the Court's improper instruction on the law of the case.

kk. Failure of Defendant's Court-Appointed Counsel to object to the Court's improper instruction on the law as it relates to aggravating and mitigating factors in sentencing. (See U.S. v. Lockett, 438 U.S. 586 (1978), in ruling that mitigating factors were limited to those listed in Florida Statute 921.141

ll. Failure of the Defendant's Court-Appointed Counsel to adequately present mitigating factors to the jury in consideration of their advisory sentence based on Defendant's lack of any significant prior criminal history and his most exemplary military service, which resulted in the Court finding that there were no mitigating factors, and the jury not being convinced that there were any mitigating factors presented.

mm. Failure of Defendant's Court-Appointed Counsel to object to the Prosecutor's impermissible and unfounded accusations of the Defendant having a prior criminal history.

nn. Failure of Defendant's Court-Appointed Counsel to object to the following improper, impermissible and prejudicial comments of the Prosecutor on the law and facts during the sentencing phase:

(1) "if a man does murder somebody in cold blood, then the penalty shall be death unless there's some strong mitigating circumstances which relieves the person from that responsibility of taking life." (Page 781)

(2) "but, anyhow, society says to the jury, or to the court system and the jury system, you all evaluate it, and unless there's mitigating circumstances, which mitigates this crime, and the Judge is going to instruct you on what mitigating is, unless there is something to mitigate that horrible act, the punishment shall be death." (Page 782).

(3) "one out of about seven or eight of mitigating circumstances said it would be mitigation if the Defendant has no significant prior criminal activity. Then I want you to listen closely and see if there is any other mitigations that have been proved here, that is mentioned under Florida law." (Page 787).

(4) "see if Judge Spear doesn't charge you that it shall be aggravating circumstances, demanding the death penalty, when you kill somebody in a commission of a robbery, or a kidnapping, or aircraft piracy or rape" (Page 788).

(5) The Prosecutor's doubling of the aggravating circumstances of robbery and commission of the offense for pecuniary gain. (Page 788).

(6) Atributing statements to the Defendant such as, "he was holding it (the gun) right here to her head and saying, bye bye baby." (Page 790).

(7) The Prosecutor's insistence to the jury that they must find significant mitigation in Order to recommend a life sentence to the Court. (Page 791).

oo. Failure of Defendant's Court-Appointed Counsel to object again to the improper instruction of the Court that mitigating circumstances are limited to those in the Statute. (Page 795).

pp. Failure of Defendant's Court-Appointed Counsel to object to the illegal imposition of the death sentence against the Defendant, in that the trial Judge imposed said sentence upon the impermissible finding that enumerated mitigating circumstances found in Subsection 7 of Florida Statute Section 921.141, were insufficient to outweigh aggravating circumstances. (Page 811).

qq. Failure of Defendant's Court-Appointed Counsel to object to the verdict of guilt of the Defendant for the first-degree murder of Ann Patterson Butler and the sentence of death subsequently imposed by the Court. The jury had previously found the Defendant guilty of robbery of Ann Patterson Butler. The verdict of guilt for first-degree murder did not specify that it was based on pre-meditation and therefore the verdict of guilt for first-degree murder of Ann Patterson Butler based on the felony-murder rule can not be precluded. Having already been found guilty of the robbery of Ann Patterson Butler it would be double jeopardy to further find the Defendant guilty of first-degree murder based on the felony-murder rule. (Page 727). An identical situation exists with respect to the verdict of guilt of the Defendant for the first-degree murder of Mary Francis Price in that he had previously been found guilty of the underlying felony of kidnapping of Mary Francis Price. (Page 728).

rr. Failure of Defendant's Court-Appointed Counsel to object to the imposition of the death penalty imposed against the Defendant in both cases for the identical reasons cited in Counsel's previous allegation and denial of Defendant's right against double jeopardy.

ss. Failure of Defendant's Court-Appointed Counsel to object to the Court's impermissible and confusing findings of fact upon which the sentences of death imposed on the Defendant are based. These findings: 1. double aggravating circumstances; 2. fail to specify that the murder of Mary Francis Price was not considered as an aggravating factor in the murder of Ann Patterson Butler; 3. fail to consider substantial mitigating factors within and without those specifically enumerated in Florida Statute 921.141; 4. fail to delineate any findings of fact as to the murder of Mary Francis Price.

tt. Failure of Defendant's Court-Appointed Counsel to make any argument whatsoever in mitigation prior to the imposition of sentence against the Defendant.

uu. Failure of Defendant's Court-Appointed Counsel to raise any of the aforementioned instances of ineffective assistance of Counsel on appeal.

3. The Defendant was sentenced in violation of the principle established in Lockett v. U.S., 438 U.S. 586 (1978).

4. The Defendant was tried and sentenced in violation of the principle established in Witherspoon v. State of Illinois, 391 U.S. 510 (1968). Excuse for cause of Juror Powell violated Witherspoon. (P. 274)

5. That the Defendant was sentenced in violation of the principle established in Godfrey v. Georgia, 100 S.Ct. 1759 (1980).

WHEREFORE, the Defendant respectfully renews the request made in his original Motion for Post-Conviction Relief and prays this Court to enter its Order reversing the Defendant's conviction and granting him a new trial, overturn the penalties imposed in this cause and grant other relief deemed appropriate by the Court.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Leo C. Jones, State Attorney, Bay County Courthouse, Panama City, Florida this 26th day of July, 1980.

Respectfully submitted,

LAW OFFICES OF TURNER & MORRIS

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LAW OFFICE OF BILL SALMON

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IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT, IN
AND FOR BAY COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

CASE NO: 75-258

vs.

CARL JACKSON,

Defendant.

SECOND AMENDMENT TO DEFENDANT'S MOTION
FOR POST-CONVICTION RELIEF

COMES NOW, the Defendant, CARL JACKSON, by and through his undersigned Attorney and enters this, his second amendment to Defendant's Motion for Post-Conviction Relief, and says:

1. That the Defendant realleges and incorporates by reference each previous allegation made in his original and amendment to Motion for Post-Conviction Relief.

2. That additional instances of the Defendant not being afforded the effective assistance of Counsel are:

a. The failure of Defendant's Court-Appointed Counsel to request a pre-sentence investigation be completed prior to the imposition of sentence in this cause. Defendant has no significant prior criminal history and has substantial family and community character support that would have been verified to the Court in mitigation of sentence to be imposed in this cause.

b. The failure of Defendant's Court-Appointed Counsel to have the Defendant examined psychologically and psychiatrically to provide a basis of support for the Defendant's post-tramatic stress disorder and other mental disorders which would have provided mitigating support during the sentencing of the Defendant in this cause.

c. Failure of Defendant's Court-Appointed Counsel to request sufficient additional time after the verdicts of guilt in this cause to prepare for the sentencing phase of Defendant's trial. Said failure resulted in the witnesses that were presented by Defendant's Counsel being unprepared (testifying psychologist

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did not even have a report or notes during her testimony) and denied the Defendant the opportunity to present family and community character and mitigating witnesses.

WHEREFORE, the Defendant respectfully requests this Court to consider this second amendment in entering its Order to grant the Defendant a new trial, overturn the Defendant's sentence and grant other relief as deemed appropriate by this Court.

Respectfully submitted,

LAW OFFICES OF TURNER & MORRIS

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I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to LEO C. JONES, III, State Attorney, Post Office Box 1040, Panama City, FL 32401, this day of , 1980.

LARRY TURNER

BILL SALMON

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR PANAMA CITY, BAY
COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 75-258-CF

CARL JACKSON,

Defendant.

/

ORDER

Petitioner filed a Motion for Post-Conviction Relief on March 19, 1980. Petitioner filed an Amendment to his Motion for Post-Conviction Relief on July 29, 1980, and a Second Amendment to his Motion for Post-Conviction Relief on July 31, 1980.

On May 20, 1980, Respondent filed a Motion to Dismiss directed to Petitioner's original Motion for Post-Conviction Relief. On September 5, 1980, Respondent's Motion to Dismiss was called on for hearing in chambers.

After considering Respondent's Motion to Dismiss and the argument of counsel on that Motion in chambers, it is ORDERED AND ADJUDGED that the Respondent's Motion to Dismiss is GRANTED in respect to all grounds raised in Petitioner's original Motion for Post-Conviction Relief filed March 19, 1980.

Petitioner raised ten grounds for relief in his original Motion for Post-Conviction Relief. Attached hereto and by reference made a part hereof are the following: (1) copies of Petitioner's (Appellant's) Initial and Reply Briefs to the Florida Supreme Court in this cause; (2) a copy of the Florida Supreme Court's Opinion rendered in this cause and reported at 359 So.2d 1190 (Fla. 1978); (3) copies of the Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida and the United States Supreme Court, including the Appendix attached thereto and his Reply to the Respondent's Reply to his Petition.

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All of the issues raised in Petitioner's original Motion for Post-Conviction Relief are improper subject matter for such a motion because they are: (1) issues raised and disposed of on direct appeal. Meeks v. State, 382 So.2d 673 (Fla. 1980), and Witt v. State, Florida Supreme Court Case No. 58,321, Opinion issued July 24, 1980; (2) issues which could have and should have been raised on direct appeal and were not. Meeks v. State; (3) issues for which no relief exists as a matter of law. Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. den. 440 U.S. 976, 99 S.Ct. 1548, reh. den. 441 U.S. 937, 60 L.Ed.2d 667, 99 S.Ct. 2064, and [illegible] v. St[illegible].

Grounds I and VI raise the issue that Petitioner was denied due process of law because he was denied access to an attorney. These grounds either were raised on direct appeal or could have and should have been raised on direct appeal. These grounds were argued in the Appellant's Initial Brief at pages 39-43 and disposed of in the Florida Supreme Court's Opinion in this case. Petitioner also raised this issue in his Certiorari Petition to the Florida Supreme Court taken in the United States Supreme Court in his Petition at 5.

In Ground II, Petitioner complains that he was denied his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution because the trial court erred in refusing to grant his Motion for Change of Venue. This issue was argued on direct appeal at the Appellant's Initial Brief at pages 28-32 and disposed of in the Florida Supreme Court's Opinion in this case.

In Ground III, Petitioner claims that his right to a fair trial under the Fifth and Sixth Amendments of the Constitution of the United States was denied because of an "impermissible comment" that occurred during the direct testimony of State's witness Bay County Sheriff Easterling. This issue was argued by the Petitioner in his Initial Brief at pages 37 and 38 and disposed of in the Florida Supreme Court's Opinion in this case.

Under Ground IV, Petitioner alleges that he was denied

his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution because the trial court erred in admitting into evidence an alleged inflammatory photograph. This issue was argued in the Petitioner's Brief at pages 33 through 36 and disposed of in the Florida Supreme Court's Opinion in this case.

Under Ground V, Petitioner complains, inter alia, about improper leading questions, misstatements of fact and law in the trial, improper repetition in emphasis of State witnesses' answers, and other procedural occurrences at trial. This issue could have and should have been raised on direct appeal.

Under Ground VII, Petitioner argues that his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were denied because the jury was selected through procedures that systematically excluded persons having scruples against the death penalty in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), reh. den. 393 U.S. 898, 89 S.Ct. 67, 21 L.Ed.2d 186. This issue could have and should have been raised on direct appeal. Further, this issue is raised under the ineffective assistance of counsel claims in Petitioner's Amendments to his original Motion for Post-Conviction Relief.

Under Ground VIII, Petitioner argues that he was denied his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution because his trial counsel failed to request that separate juries be selected for the guilt and penalty phase of his trial. Petitioner has cited no law in support of this claim and there is no law known to this Court that would require such a request. Consequently, Petitioner has failed to state a claim for which there is relief.

Under Ground IX, Petitioner argues that his rights to due process and equal protection were violated because the death penalty discriminates against black people and in favor of white people. This claim was specifically rejected in Meeks v. State and is "the law of the case" to which this Court is bound.

Under Ground X, Petitioner alleges that his "fundamental rights" were denied for various sentencing errors, all of which either were raised or could have and should have been raised on direct appeal. See, e.g., the Appellant's Brief at 56 and the Florida Supreme Court's Opinion in this case.

DONE AND ORDERED at Panama City, Bay County, Florida, this 14 day of [illegible], 1980.

FRED TURNER, CIRCUIT JUDGE

cc: Judy M. Pittman
Assistant State Attorney
14th Judicial Circuit

Larry Gibbs Turner and
Bill Salmon
Attorneys for Petitioner

David P. Gauldin
Assistant Attorney General

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY. CASE NO. 75-253.

STATE OF FLORIDA,

vs.

CARL JACKSON,

Defendant.

O R D E R

The Defendant has filed a Rule 3.850 motion alleging, inter alia that his trial counsel was ineffective. The Court has previously denied relief on all other grounds except ineffectiveness of counsel.

The Court on November 3 and 4, 1980, has conducted an evidentiary hearing in compliance with MEEKS VS. STATE, 332 So.2d 673, and permitted counsel to submit briefs, and upon consideration of the evidence and the briefs, the Court finds that the evidence, motions and the files and records in this case conclusively show that the Defendant is entitled to no relief.

From the beginning to the end of the evidence phase of this motion, it was apparent to the Court that it was the position of the Defendant that he was entitled to a textbook defense and the Court has no quarrel with that ideal but the record shows that defense counsel exercised every reasonable defensive weapon available to her. Considering that every trial is different from every other and even a re-trial is different from an original trial, the rules laid down by our appellate courts for the conduct of counsel must make some allowances for the exigencies of the case. I doubt that any of our appellate courts have ever reviewed a textbook defense in a criminal case. I do not deprecate the efforts of appellate counsel to belittle the efforts of trial counsel, but trial counsel should not bear the brunt of scatter gun motions where the evidence in support of said motion is but mere conjecture, supposition and questionable deductions. A printed transcript may suggest a deficiency in trial counsel's preparation and conduct on the one hand

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when in truth and in fact, trial tactics dictated the course taken at trial. From the totality of the circumstances in this case, it is the finding of the Court:

A. That Dedee Costello rendered effective assistance of counsel to the Defendant, Carl Jackson.

B. That her lack of experience (at that time) did not deprive the Defendant of a fair trial nor was it prejudicial to him at the trial.

C. There was no intentional or unintentional omission by trial counsel of any duty devolving upon her at trial which resulted in any prejudice to the Defendant, and.

D. That trial counsel exhibited the highest standards of ethical conduct in her defense of the Defendant.

I cannot find fault, on the contrary, I commend, Ms. Costello for her defense of the Defendant who was charged with the murder of two female victims within a short period of time and whose bloody fingerprint was found underneath the head of the second victim. Considering the defenses available to Ms. Costello, insanity, alibi, intoxication and soddi (some other dude did it), she was left with little choice but to attack the State's presentation of its evidence in chief. She performed well and adequately in the mechanical portions of the trial and nothing less than a magic wand could have erased the Defendant's fingerprint under the head of his second victim. It is justly said that hindsight is 20/20; judged by that standard, I cannot conceive of anything that trial counsel did or failed to do which would have changed the results of the trial in any material particular nor can I see of the totality of the circumstances surrounding this case that Ms. Costello was remiss in her obligation towards the Defendant to render him effective assistance of counsel. Accordingly, it is,

ORDERED and ADJUDGED that the Defendant's amendment to Motion for post conviction relief and second amendment for post conviction relief alleging ineffectiveness of counsel under Rule 3.850, RCrP, be and the same is hereby denied. It is further,

ORDERED and ADJUDGED that the Defendant is advised that he has the right to appeal this order to the District Court of Appeal, First District of Florida, and if he wishes to appeal, he must file his notice of appeal with the Clerk of this Court within thirty (30) days of this date. If he does not have the funds to pay for the appeal, the undersigned will appoint an Attorney to take the appeal for the defendant at no expense to him.

ORDERED at Panama City, Bay County, Florida, this 31 day of December, 1980.

W. Fred Turner

W. FRED TURNER, CIRCUIT JUDGE

for mistrial relating to the ineffective assistance of counsel. Clearly, in my opinion, it was constitutionally required to address the issue on the merits. This issue was raised at trial and was ruled on by the trial judge. I would consider the issue on its merits and dispose of it at this time since the matter was ruled on by the trial court and has been argued on the merits in the briefs before this Court.

The purpose of a Rule 3.850 proceeding is to provide an expeditious remedy for attacking a judgment or a sentence imposed in violation of the constitution and laws of the United States or of the State of Florida. It clearly was not intended to provide an additional proceeding for an issue which was presented to the trial court and properly raised on appeal. In this case we are setting a bad precedent by encouraging multiple judicial proceedings which are not required.

In my view, upon the first indication or knowledge by the trial judge that there is ineffective assistance of counsel, he should immediately address the issue, take testimony if necessary, and resolve it. To leave the issue open for further proceedings only creates unnecessary work for prosecutors, defense counsel, and the judiciary.

The trial judge in this instance expressed concern that to grant a mistrial for ineffective assistance of counsel would set a dangerous precedent, opening the door for this issue to be used in a tactical manner in criminal trials. I disagree with the trial judge's concern. Although a defendant may be entitled to a mistrial because his counsel was dilatory and unprepared, that does not mean that there is no recourse to avoid the improper use of our criminal justice process. Counsel guilty of such conduct would be subject to sanctions which could include counsel personally paying the costs and expenses of the trial up to the time of the mistrial, in addition to counsel being subject to appropriate disciplinary proceedings. I reject the view asserted by the attorney general that trial counsel is neither legally nor ethically competent to raise his own ineffectiveness before the trial judge. In Valle v. State, 394 So.2d 1004 (Fla.1981), we recognized that it was a proper issue to be brought up by trial counsel where the failure to prepare was brought about by the speed in which the case was brought to trial and not by trial counsel's dilatory action. In this case, counsel's alleged ineffectiveness was argued to have been caused, at least in part, by defense counsel's physical condition. In both instances counsel was unprepared.

I would find that on this record the trial judge should have taken more time to have a hearing on the issue. The contentions of counsel are basically unrefuted and, therefore, on this record, I must find that a mistrial should have been granted. I also would find, however, that the conduct of petitioner's counsel justified sanctions in the amount of the cost of the proceedings up to the time of the motion for mistrial. In addition, I would direct that the record in this cause be referred to the appropriate grievance committee for possible disciplinary action.

For the reasons expressed, I would reverse and remand for a new trial.

Carl JACKSON, Appellant,

v.

STATE of Florida, Appellee.

No. 60202.

Supreme Court of Florida.

July 28, 1983.

Rehearing Denied Sept. 30, 1983.

The Circuit Court in and for Bay County, W. Fred Turner, J., denied motion for postconviction relief, and movant appealed. The Supreme Court, Adkins, J., held that movant, who was found guilty of robbery,

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kidnapping and two counts of first-degree murder and sentenced to death, was not denied effective assistance of counsel at trial, sentencing or on appeal.

Affirmed.

Ehrlich, J., dissented.

1. Criminal Law ⇐998(3)

Movant's allegations that excusal of certain prospective jurors violated United States Supreme Court decision could and should have been raised in his initial appeal, along with questions whether trial court erred by not ordering presentence investigation and whether jury instructions and sentencing order violated another United States Supreme Court decision, and thus those issues were not cognizable on motion for postconviction relief. West's F.S.A. RCrP Rule 3.850.

2. Criminal Law ⇐641.13(2, 7)

Movant, who was convicted of robbery, kidnapping and two counts of first-degree murder and sentenced to death, was not denied effective assistance of counsel at trial, sentencing or on appeal where lack of objection to labeling of fingerprint did not prejudice movant, where "failure to investigate and present defense" and to request instructions on effect of jury recommendation of mercy constituted reasonable strategy, and where any deficiencies in voir dire examination did not affect outcome of proceedings.

Larry G. Turner of the Law Offices of Larry G. Turner, and Bill Salmon of the Law Offices of Bill Salmon, Gainesville, for appellant.

Jim Smith, Atty. Gen. and David P. Gaulin, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal from an order of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County denying a motion for post-conviction relief. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant, Carl Jackson, was charged with robbery, kidnapping, and two counts of first-degree murder. The crimes are described in more detail in our opinion in *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 62 (1979) (hereinafter *Jackson I*). Ms. Dedee Costello was appointed to represent appellant at trial and entered on his behalf a plea of not guilty. He was, however, found guilty on all counts.

At the conclusion of the sentencing phase of the trial, the jury recommended that appellant be put to death for both murders. The trial court concurred and imposed the death penalty, which this Court affirmed. *Jackson I*. Appellant thereafter filed in the circuit court, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, a motion for post-conviction relief alleging several infirmities in the conduct of his trial. The circuit court denied the motion and this appeal followed.

[1] Three of the four issues argued by appellant are matters that could or should have been raised on direct appeal, and so are not cognizable in this proceeding. *Adams v. State*, 380 So.2d 423 (Fla.1980). Appellant's allegations that the excusal of certain prospective jurors violated *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), could and should have been raised in his initial appeal to this Court. *Meeks v. State*, 402 So.2d 673 (Fla. 1980). Similarly, he should have argued the questions of whether the trial court erred by not ordering a presentence investigation and whether the judge's jury instructions and sentencing order violated the decision in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). We need not consider these three issues in this opinion.

[2] The issue properly raised in this proceeding is appellant's contention that the trial court erred in finding that he was afforded effective assistance of counsel at trial, sentencing, and appeal. First in the list of alleged errors and omissions is defense counsel's "failure to adequately conduct discovery, investigate, and prepare in

anticipation of trial." Appellant notes that his attorney deposed only one of the more than twenty potential witnesses named on a list provided by the state and so was "obviously disadvantaged" in her cross-examination of the state's witnesses. The lack of depositions also hindered counsel's attempts to have suppressed certain evidence introduced at trial, claims appellant.

Next in the list of alleged errors are the failure to timely object to the introduction of a fingerprint which appellant claims was not properly marked as his and counsel's "ineffective" efforts to obtain a change in venue. Both are attributed to his attorney's "lack of experience and preparation."

Defense counsel's voir dire examination of potential jurors is faulted in several ways. Appellant argues that the issues of pre-trial publicity and racial bias were only cursorily and ineffectively delved into, and that counsel's *Witherspoon* inquiry was glaringly deficient. Also faulted are his counsel's failure to request sequestered voir dire of certain prospective jurors and to ask for additional peremptory challenges after using the forty allotted appellant.

The total "failure to investigate and present a defense" is a significant example of the inadequate representation which he received, claims appellant. He argues that his lawyer was made aware of several individuals whose testimony might have provided an alibi defense, and that she failed to investigate and develop the same simply because an assistant state attorney assured her that the men in question would testify that they had not been with appellant at the relevant times. Finally, appellant notes that his counsel failed to request jury instructions on the effect of a jury recommendation of mercy and did not request a presentence investigation report before the trial court passed sentence.

In *Knight v. State*, 394 So.2d 997 (Fla. 1981), we established the standards which must be met by a party alleging ineffective assistance of counsel as here. The four-part test requires:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in *DeCoster III* [*United States v. DeCoster*, 624 F.2d 196 (D.C.Cir. 1979)]: "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions.
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established.

394 So.2d at 1001 (footnote omitted).

Although appellant met the first requirement above, he failed to show that most of the omissions were serious deficiencies beyond what would be expected of competent counsel. His expert witness' testimony that

defense counsel's pre-trial discovery and motions were inadequate was countered by that of appellee's expert witness who stated that the representation provided was "reasonably effective." The trial court agreed with appellee's witness and nothing in the record compels us to disturb that result.

The lack of objection to the labeling of the fingerprint also fails to convince us that counsel was ineffective. Even if we agreed that such was measurably below what is expected of competent attorneys, it certainly did not so prejudice appellant that he might otherwise not have been found guilty, since it was not disputed that his fingerprint was found at the scene.

The remainder of the alleged shortcomings may be dismissed in a similar manner. The "failure to investigate and present a defense" and to request instructions on the effect of a jury recommendation of mercy do not fall measurably below the standard expected of competent counsel. Although appellant is obviously dissatisfied with the result of the defense that was presented, we will not use the perfect vision of hindsight and label that defense incompetent. It was, under the circumstances, a reasonable strategy.

Defense counsel's voir dire examination regarding pretrial publicity, racial bias, and imposition of the death penalty was not so lacking as to be considered incompetent. If it was deficient at all, it was not substantial enough to demonstrate a prejudice to appellant so severe that it affected the outcome of the proceedings. The record shows that appellant's guilt was clearly and convincingly demonstrated by more than adequate evidence. Any shortcomings in voir dire were not the conclusive and decisive factors in his conviction.

As the trial court noted in denying appellant's rule 3.850 motion, a "textbook defense" is not the requirement here. The trial court heard the arguments in the 3.850 hearing, considered the expert testimony presented by both sides, and determined that the representation afforded appellant was adequate. None of the arguments raised convince us that said decision was unsubstantiated or incorrect, and so the trial court's decision is affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON and McDONALD, JJ., concur.

EHRLICH, J., dissents.

Larry Alan STRICKLAND, Petitioner,

v.

STATE of Florida, Respondent.

No. 62358.

Supreme Court of Florida.

July 28, 1983.

Rehearing Denied Sept. 29, 1983.

Defendant was convicted before the Circuit Court, Bay County, W. Fred Turner, J., of attempted first-degree murder with a firearm, and he appealed. The District Court of Appeal, 415 So.2d 808, affirmed, and a further appeal was taken. The Supreme Court, Ehrlich, J., held that since use of a firearm was not an essential element of crime of attempted first-degree murder, life sentence was correct.

Affirmed.

1. Criminal Law ⇐1208.6(2)

First-degree felony must be reclassified to a life felony if a weapon or firearm is used as long as the use of the weapon or firearm is not an essential element of the charged crime; receding from *King v. State*, 390 So.2d 315 (Fla.1980). West's F.S.A. § 775.087.

2. Homicide ⇐354

Since use of a firearm is not an essential element of crime of attempted first-de-

IN THE SUPREME COURT OF FLORIDA

CARL JACKSON,	)	ON APPEAL FROM THE FOURTEENTH JUDICIAL CIRCUIT COURT, BAY COUNTY, FLORIDA
Appellant,	)	
VS	)	CASE NO. 60-202 75-258-CF
THE STATE OF FLORIDA,	)	
Appellee.	)	

APPELLANT'S
MOTION FOR REHEARING

The Appellant, CARL JACKSON, by and through his undersigned counsel and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, respectfully moves this Court for a rehearing of the above-styled cause based upon overlooked or misapprehended points of fact and law in the published Opinion of this Tribunal dated 28 July 1983. In support of his Motion the Appellant CARL JACKSON, (hereinafter "Jackson") would show that this Court in determining that the failure of Jackson's attorney to investigate and present a defense did "... not fall measurably below the standard expected of competent counsel," overlooked the law with reference to this issue as enunciated by the Eleventh Circuit Court of Appeals in its recent decision of Weidner v. Wainwright, Case No. 82-5122, and decided on June 27, 1983. In that case, the Defendant Weidner was convicted in State Court in the State of Florida of second-degree murder. His conviction was affirmed on direct appeal

EXHIBIT 8

[Weidner v. State, 318 So.2d 502 (Fla. 2d DCA 1975) and Weidner v. State, 322 So.2d 671 (Fla. 2d DCA 1975)] and he subsequently was denied post-conviction relief. [Weidner v. State, 352 So.2d 181 (Fla. 2d DCA 1977) and Weidner v. State, 341 So.2d 302 (Fla. 2d DCA 1976)]. Having exhausted his State remedies, Weidner filed a Writ of Habeas Corpus in the District Court for the Middle District of Florida, Tampa Division. The Honorable Terrell Hodges, Chief Judge, adopted the recommendations of the Magistrate and granted the Writ. The facts of Weidner's case as elicited at trial established that one Joey Motz, the victim, was shot in the parking lot of a bar in Tampa. Weidner, a patron of the bar, was approached by Motz and four or five of Motz's friends. Although Weidner was intoxicated at the time, he managed to retrieve a gun from his car and warned Motz and his friends to come no closer. Apparently Motz did not heed the warning but instead jumped on Weidner's car and was shot and killed by Weidner. At trial, Weidner's privately retained counsel (Hobbs) argued a theory of accident or, alternatively, excusable homicide. A self-defense theory was mentioned in passing and an instruction on the defense was given by the Court; however, self-defense was never argued seriously to the jury. This was despite the fact that Weidner had told Hobbs that he was attacked and that his money was missing when he arrived at the police station. The District Court, on Weidner's habeas corpus Petition, found that prior to his trial, Weidner's attorney did not hire an investigator nor did he send an associate of the firm to the scene of the shooting. Hobbs

did not acquire a copy of the autopsy report, nor did he depose the medical examiner or the arresting officer.

Once the trial was completed, four witnesses were discovered whose testimony would have supported Weidner's self-defense theory. Clifford Schultz testified that it was generally known that Weidner carried large amounts of cash at the bar, as he did the night of the shooting. Schultz further testified that he overheard Motz and his friends plan to rob Weidner. Dorothy Walker, who also was present the night of the shooting, would have testified that Weidner had a large amount of cash, that it was generally known that Motz robbed patrons of the bar, and that Motz went outside to rob Weidner the night of the shooting. Glen Allen would have testified that the men at the bar, including Motz, were going to rob Weidner. And finally, John Priestly would have testified that Motz confided in him that he had previously robbed Weidner. The Eleventh Circuit held that the case "cried out" for a theory of self-defense and that the above-listed witnesses would have been beneficial to that defense. The Court went on to hold that Hobbs' failure to obtain the autopsy report or to interview the medical examiner prejudiced Weidner's defense since the autopsy report indicated a trajectory of the bullet which was inconsistent with the State's theory of the incident. Finally, the Court, quoting from other decisions the citations of which are omitted here, concluded that "at the heart of effective representation is the independent duty to

investigate and prepare. Therefore, permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a Defendant's one plausible line of defense." (at 3751) The Eleventh Circuit then upheld Judge Hodges' grant of habeas corpus relief.

In comparing the Weidner decision with the case at bar, it is clear that the failure of JACKSON's court-appointed counsel to adequately conduct discovery, investigate and prepare in anticipation of trial, falls well below the standard of effective assistance of counsel as applied in Weidner. Of more than 20 witnesses named in discovery by the State, JACKSON's attorney deposed only one. Of the remaining witnesses, she neither deposed nor interviewed any with the exception of cross-examination at a preliminary hearing of Arnold Lee Price, the husband of one of the victims. Ms. Costello admitted that this cross-examination was limited because of Mr. Price's emotional condition at the time of the preliminary hearing and the restrictions imposed on cross-examination at preliminary hearings. (TH-33) Thereafter, Ms. Costello made no effort to interview or depose Mr. Price. Likewise, Ms. Costello neither interviewed nor deposed:

1. Panama City police officer Dan Hilburn, the first officer responding to the scene. (T-358 et seq.)

2. Evelyn Shipes, the District Manager for Sunshine Grocery which operated the Junior Food Store (the scene of the crime) who testified to the proceeds of the robbery and who identified the victim Ann Patterson Butler as an employee of the store who was on duty on the date in question. (T-374-388)

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3. Panama City police officer Ralph Porter, who discovered the body of Mrs. Price in her automobile where it had been abandoned at a local cemetery. (T-410-421)

4. Panama City police Sergeant Tommy Winslett, who also responded to the cemetery and who testified, inter alia, to the identity of Mrs. Price. (T-426)

5. Powell Adams, who assisted in the search of the cemetary area and who testified that he found a tan jacket lying under a piece of tin in the woods behind the cemetery. This is significant because other witnesses testified that the Defendant JACKSON owned and/or was wearing on the date in question a jacket variously described as gold with a rainhood to beige with no hood. The jacket Mr. Adams found was tan with no hood. (T-444-449)

6. Dr. Ralph Monaco, the medical examiner who testified as to injuries and cause of death of both women. (T-445-467)

7. Jacquelyn Williamson, who saw the Defendant JACKSON at approximately the time of the incident when he appeared at her apartment which is located behind the cemetery previously mentioned. (T-479-485)

8. Jack Mason, then a camera man for a local television station, who gave the Defendant JACKSON a ride at approximately 10:15 a.m. on the morning in question (the crime having been committed some time between 8 and 9 a.m. that morning). Mason testified that the Defendant JACKSON appeared to know about the shooting at the cemetery even though the information to that effect had not yet been released to the news media. (T-490-493)

9. Jack Duncan, a fingerprint examiner with the Florida Department of Law Enforcement, who testified that one of the Defendant's fingerprints was found on a package of

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Kool cigarettes found inside the Price motor vehicle. Duncan concluded this by comparing the fingerprint with a set of ink fingerprints which Bay County Deputy Sheriff William Sellers testified he took from the Defendant. However, at trial, the ink prints which Sellers claimed were the Defendant's had no markings or writings on the card to identify them as having been taken by Sellers or from JACKSON. In addition to her failure to depose Duncan, JACKSON's court-appointed attorney failed to depose Sellers and failed to inspect the fingerprint evidence. This failure resulted in her not objecting to Sellers' identification of the card of ink fingerprints as being those of the Defendant and thus, they were allowed into evidence as "undisputed testimony". (T-534)(T-523-531)

10. Bay County Sheriff Easterling, who testified, inter alia, to an incriminating statement made by the Defendant JACKSON. (T-579 et seq.) As a result of her failure to depose Sheriff Easterling, Defendant JACKSON's court-appointed counsel filed no pretrial motion testing the admissibility of the incriminating statement and at trial she interposed the weak objection of simply "Judge, we object to the introduction of the statement on the grounds that it was not freely and voluntarily given." (T-565) No pretrial motion nor objection was made predicated upon the Defendant's request for counsel, and notwithstanding the sheriff's admission that the Defendant had made such a request. (T-42,104)

11. Bay County Deputy Sheriff William Sellers, and Tom McCauley, Stenographer Janet Boyd and Bay County police officer Mancil, all of whom were present during the above-referenced statement to Sheriff Easterling. (T-519)

12. Bay County Deputy Sheriff Bill Lewis who testified among other things, to a second statement made by the Defendant JACKSON which statement was contradictory to the statement JACKSON gave to Sheriff Easterling. Again,

> this failure to depose the witness resulted in no pretrial motion testing the admissibility of the statement and again only a weak trial objection was raised, to-wit: "Judge, I object to the introduction of the statement on the grounds that Mr. JACKSON was represented by counsel and counsel was not informed of this interview in advance." (T-592) (T-582-600)

Another significant parallel between the case at bar and Weidner appears from Ms. Costello's failure to search out and interview defense witnesses. At the hearing on the Defendant's MOTION FOR POST-CONVICTION RELIEF, JACKSON testified that he told Ms. Costello where he was on the date and time in question and gave her the names of individuals who could testify thereto. (RH-89 et seq.) Indeed, Ms. Costello testified that she was advised by JACKSON of the existence of a number of potential alibi witnesses and of his activities on the date and time in question. She further testified, however, that she made no effort to contact and interview any of these witnesses because she concluded that they saw JACKSON too late in the day to provide him with an alibi. (RH-787 et seq.) Further, at the hearing on the Defendant's MOTION FOR POST-CONVICTION RELIEF, he called, among other potential alibi witnesses, John Raymond and Jesse Hudson; both witnesses testified to seeing JACKSON at or around the time of the alleged offenses. (RH-709). After this testimony, Ms Costello was recalled to the witness stand by the State. She then testified that in reviewing her notes from her file she discovered that on June 25, 1975, Assistant State Attorney Jim Appleman, (now State Attorney

Jim Appleman) told her of two witnesses who were prepared to testify that they did not see CARL JACKSON on the date in question. Those witnesses were identified as John Raymond and Gerald Davis. Hence Ms. Costello accepted this representation from Mr. Appleman and made no effort to contact Davis and Raymond to confirm whether or not they could provide her client with his badly needed alibi. (RH-783 et seq.) She further testified that notwithstanding the fact that JACKSON told her he was at the Royal Cafe operated by Jesse Hudson at the time of the alleged crimes, neither she nor an investigator visited the cafe in an effort to corroborate this information. In other words, notwithstanding the fact that Ms. Costello, by her own admission, had no theory of defense, she failed to explore the one possible defense available to her, that being the defense of alibi. This, notwithstanding the fact that her client provided her with the names of witnesses who might help her. Indeed, she accepted without question, the word of counsel for the prosecution that two of those witnesses would not be helpful. It is respectfully submitted that this failure falls below the standard of effective assistance of counsel. The parallels between the case at bar and the Weidner case are too striking to be ignored.

In conclusion, the Appellant CARL JACKSON feels that this Court should grant rehearing and should reconsider the facts of his case, as briefly outlined above, in light of the recent

decision of Weidner v. Wainwright, id.

Respectfully submitted,

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Post Office Box 508
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Counsel for CARL JACKSON

BILL SALMON
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Post Office Box 1095
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904/378-6076

Counsel for CARL JACKSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished to DAVID P. GAULDIN, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 by U. S. Mail this 11th day of August, 1983.

Respectfully submitted,

LARRY G. TURNER

BILL SAIMON

Supreme Court of Florida

FRIDAY, SEPTEMBER 30, 1983

CARL JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

RECEIVED OCT 3 1983

CASE NO. 60,202

Circuit Court No. 75-258-CF
(Bay)

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and McDONALD, JJ., concur
EHRLICH, J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. Harold Bazzel, Clerk
Hon. W. Fred Turner, Judge

Larry G. Turner, Esquire
Bill Salmon, Esquire
David P. Gauldin, Esquire

EXHIBIT 9

Mandate
Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court in and for Bay County, Florida

WHEREAS, in that certain cause filed in this Court styled:

CARL JACKSON v. STATE OF FLORIDA

RECEIVED NOV 2 1983

Case No. 60,202

Your Case No. 75-258-CF

The attached opinion was rendered on July 28, 1983.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Alderman

Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital,

on this 1st day of November 1983.

Clerk of the Supreme Court of Florida.

EXHIBIT 10

STATEMENT OF MAILING

The undersigned, LARRY G. TURNER, having been duly sworn, deposes and states that he is a member of the Bar of the United States Supreme Court, and that APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has, pursuant to Rule 28.2, Revised Rules of the Supreme Court of the United States, been deposited in a United States Post Office or mail box in Gainesville, Florida, with first-class postage prepaid, properly addressed to the clerk of the United States Supreme Court, within the time allowed for filing, and that to my knowledge the mailing took place on 29 November 1983.

LARRY G. TURNER

SWORN TO AND SUBSCRIBED before me this 29th day of November, 1983.

NOTARY PUBLIC

My Commission Expires:

Notary Public, State Of Florida At Large
My Commission Expires June 9, 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has been served upon David P. Gauldin, Assistant Attorney General, Department of Legal Affairs, The Capitol, 1502, Tallahassee, Florida 32301 by depositing said document in a United States Post Office or mailbox with first-class postage prepaid, this 29th day of November 1983.

LARRY G. TURNER
Post Office Box 508
Gainesville, Florida 32602
904/375-4460
Counsel of Record

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Case No. 83-5840

CARL JACKSON,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE UNITED STATES SUPREME COURT

JIM SMITH
Attorney General

DAVID P. GAULDIN
Assistant Attorney General

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

(904) 488-0290

COUNSEL FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Case No. 83-5840

CARL JACKSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Any record references shall be to Petitioner's Petition, hereinafter referred to by the symbol "P" followed by the appropriate page number or to Petitioner's appendix, hereinafter referred to by the symbol "A" followed by the appropriate page number.

OPINION BELOW

Petitioner seeks review of Jackson v. State, 437 So.2d 147 (Fla. 1983), in which the Florida Supreme Court, inter alia, denied Jackson's claim of ineffective assistance of counsel.

JURISDICTION

Petitioner improvidently seeks to invoke this Court's jurisdiction pursuant to Title 28, U.S.C., Section 1257 (3). The issues raised by Petitioner should not be reviewed by this Court. Review by Writ of Certiorari is matter of sound judicial discretion, and will be granted only where there are special and important reasons therefore. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct.2437, 41 L.Ed.2d 341 (1974).

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT, WHICH RELIED UPON THE "OUTCOME-DETERMINATIVE" TEST OF UNITED STATES v. DECOSTER, 624 F.2d 196 (D.C. Cir. 1979) AND KNIGHT v. STATE, 394 So.2d 997 (Fla. 1981), APPLIED THE CORRECT STANDARD FOR REVIEW OF PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

REASONS FOR NOT GRANTING THIS WRIT

The issue of whether the "outcome-determinative" test of United States v. Decoster, 624 F.2d 196 (D.C. Cir 1979) and Knight v. State, 394 So.2d 997 (Fla. 1981) is the proper touchstone to test the effectiveness of counsel is presently before this Court in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (unit B) (en banc) cert. granted, _U.S._ , 103 S.Ct. 2451, 75 L.Ed.2d _ (1983).

The State of Florida's position on which of these tests is appropriate is delineated in its briefs in Washington v. Strickland, and need not be repeated here. No purpose would be served by accepting this case for jurisdiction while Washington v. Strickland is pending. If the outcome is adverse to the State of Florida's position, petitioner can seek relief in the State of Florida or through the federal court system for a review pursuant to the Washington v. Strickland standard.

Moreover, under either standard, petitioner's claim of ineffective assistance of counsel would fail. Petitioner relies upon Weidner v. Wainwright, 708 F.2d 614 (11th Cir.1983) to support his claim of ineffective assistance of counsel. Weidner differs substantially from petitioner's case. In Weidner, there was a legitimate self-defense theory which could have and should have been investigated and argued. Both witnesses and physical evidence in Weidner substantiated the self-defense theory that was not argued there and the law was inconsistant with the theory of defense argued in Weidner.

Here, Petitioner's counsel testified that her defense

strategy was to discredit the State's case and convince the jury that someone else had killed the victim. (TH-459). Petitioner only vaguely mentioned his alibi "defense" and did not give her any names of witnesses that would support this indefinite alibi. (TH-430,458). She wasn't about to conjure up an alibi defense after the fact. (TH-429). Petitioner was uncooperative with her. (TH-434, 458).

Jesse Hudson, an alleged or potential alibi witness, testified that he thought that he saw petitioner at the Royal Cafe on the morning of the murder but he was unsure as to the exact time and admitted that the Royal Cafe was only several blocks from the scene of the crime. (TH-708-812, 713-717). Ben Blakely, another potential alibi witness, testified that he believed that he saw petitioner on the morning of the murder at or around 8:30 but he was not sure which day of the week it was. (TH-728). John Raymond, another potential alibi witness, testified that he had seen Carl Jackson at or around the time of the murder and he was willing to testify to that effect (TH-736-737), but his testimony was directly contradicted by the chief investigator of the local sheriff's department, who consulted his recorded notes of the statement given by Raymond to his office back in 1975, when Raymond stated categorically that he had not seen petitioner on the day of the murder. (TH-937-938).

Defense counsel also testified that her notes reflected that Raymond had told her that he had not seen petitioner on the date of the murder. (TH-783-786). Moreover, she did not need to depose the witnesses listed in petitioner's Motion for Rehearing (A-8) because she was aware of their testimony either from the probable cause hearing held in petitioner's case or because she

had informally interviewed many of these witnesses. (TH-449; 452-457). She did depose the key witness in this case, James Harris. (TH-451).

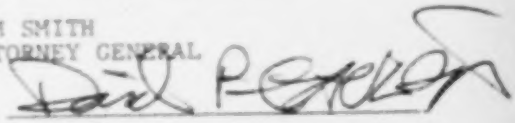
Thus, petitioner's case is substantially different from Weidner v. Wainwright, and defense counsel's representation of petitioner would pass either the "outcome-determinative" test or the test adopted in Washington v. Strickland by the Eleventh Circuit. As such, there is no need for this Court to accept Certiorari Jurisdiction.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should decline to excercise its discretionary jurisdiction because 1) petitioner could be afforded relief in the state or federal court systems if this Court adopts the Washington v. Strickland test or 2) under the facts of his case, petitioner's defense counsel would have been effective under either test.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

By 

David P. Gauldin
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida and the Supreme Court of the United States has been served upon Mr. Larry G. Turner and Mr. Robert S. Griscti, Post Office Box 508, Gainesville, Florida 32602, and Mr. William B. Salmon, Post Office Box 1095, Gainesville, Florida 32602, by depositing said document with a proper agent of Express Mail for overnight delivery on this 28th day of December, 1983.

DAVID P. GAULDIN
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Case No. 83-5840

CARL JACKSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO RESPONSE TO THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND THE UNITED STATES SUPREME COURT

JIM SMITH
ATTORNEY GENERAL

David P. Gauldin
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Department of Legal Affairs
The Capitol
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(904) 488-0290

COUNSEL FOR RESPONDENT

IN THE SUPREME COURT OF FLORIDA

CARL JACKSON,	)	ON APPEAL FROM THE FOURTEENTH JUDICIAL CIRCUIT COURT, BAY COUNTY, FLORIDA
Appellant,	)	
VS	)	CASE NO. 60-282 75-258-CF
THE STATE OF FLORIDA,	)	
Appellee.	)	

APPELLANT'S
MOTION FOR REHEARING

The Appellant, CARL JACKSON, by and through his undersigned counsel and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, respectfully moves this Court for a rehearing of the above-styled cause based upon overlooked or misapprehended points of fact and law in the published Opinion of this Tribunal dated 28 July 1983. In support of his Motion the Appellant CARL JACKSON, (hereinafter "Jackson") would show that this Court in determining that the failure of Jackson's attorney to investigate and present a defense did "... not fall measurably below the standard expected of competent counsel," overlooked the law with reference to this issue as enunciated by the Eleventh Circuit Court of Appeals in its recent decision of Weidner v. Wainwright, Case No. 82-5122, and decided on June 27, 1983. In that case, the Defendant Weidner was convicted in State Court in the State of Florida of second-degree murder. His conviction was affirmed on direct appeal

EXHIBIT 8

[Weidner v. State, 318 So.2d 502 (Fla. 2d DCA 1975) and Weidner v. State, 322 So.2d 671 (Fla. 2d DCA 1975)] and he subsequently was denied post-conviction relief. [Weidner v. State, 352 So.2d 181 (Fla. 2d DCA 1977) and Weidner v. State, 341 So.2d 302 (Fla. 2d DCA 1976)]. Having exhausted his State remedies, Weidner filed a Writ of Habeas Corpus in the District Court for the Middle District of Florida, Tampa Division. The Honorable Terrell Hodges, Chief Judge, adopted the recommendations of the Magistrate and granted the Writ. The facts of Weidner's case as elicited at trial established that one Joey Motz, the victim, was shot in the parking lot of a bar in Tampa. Weidner, a patron of the bar, was approached by Motz and four or five of Motz's friends. Although Weidner was intoxicated at the time, he managed to retrieve a gun from his car and warned Motz and his friends to come no closer. Apparently Motz did not heed the warning but instead jumped on Weidner's car and was shot and killed by Weidner. At trial, Weidner's privately retained counsel (Hobbs) argued a theory of accident or, alternatively, excusable homicide. A self-defense theory was mentioned in passing and an instruction on the defense was given by the Court; however, self-defense was never argued seriously to the jury. This was despite the fact that Weidner had told Hobbs that he was attacked and that his money was missing when he arrived at the police station. The District Court, on Weidner's habeas corpus Petition, found that prior to his trial, Weidner's attorney did not hire an investigator nor did he send an associate of the firm to the scene of the shooting. Hobbs

did not acquire a copy of the autopsy report, nor did he depose the medical examiner or the arresting officer.

Once the trial was completed, four witnesses were discovered whose testimony would have supported Weidner's self-defense theory. Clifford Schultz testified that it was generally known that Weidner carried large amounts of cash at the bar, as he did the night of the shooting. Schultz further testified that he overheard Motz and his friends plan to rob Weidner. Dorothy Walker, who also was present the night of the shooting, would have testified that Weidner had a large amount of cash, that it was generally known that Motz robbed patrons of the bar, and that Motz went outside to rob Weidner the night of the shooting. Glen Allen would have testified that the men at the bar, including Motz, were going to rob Weidner. And finally, John Priestly would have testified that Motz confided in him that he had previously robbed Weidner. The Eleventh Circuit held that the case "cried out" for a theory of self-defense and that the above-listed witnesses would have been beneficial to that defense. The Court went on to hold that Hobbs' failure to obtain the autopsy report or to interview the medical examiner prejudiced Weidner's defense since the autopsy report indicated a trajectory of the bullet which was inconsistent with the State's theory of the incident. Finally, the Court, quoting from other decisions the citations of which are omitted here, concluded that "at the heart of effective representation is the independent duty to

investigate and prepare. Therefore, permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a Defendant's one plausible line of defense." (at 3751) The Eleventh Circuit then upheld Judge Hodges' grant of habeas corpus relief.

In comparing the Weidner decision with the case at bar, it is clear that the failure of JACKSON's court-appointed counsel to adequately conduct discovery, investigate and prepare in anticipation of trial, falls well below the standard of effective assistance of counsel as applied in Weidner. Of more than 20 witnesses named in discovery by the State, JACKSON's attorney deposed only one. Of the remaining witnesses, she neither deposed nor interviewed any with the exception of cross-examination at a preliminary hearing of Arnold Lee Price, the husband of one of the victims. Ms. Costello admitted that this cross-examination was limited because of Mr. Price's emotional condition at the time of the preliminary hearing and the restrictions imposed on cross-examination at preliminary hearings. (TH-33) Thereafter, Ms. Costello made no effort to interview or depose Mr. Price. Likewise, Ms. Costello neither interviewed nor deposed:

1. Panama City police officer Dan Hilburn, the first officer responding to the scene. (T-358 et seq.)

2. Evelyn Shipes, the District Manager for Sunshine Grocery which operated the Junior Food Store (the scene of the crime) who testified to the proceeds of the robbery and who identified the victim Ann Patterson Butler as an employee of the store who was on duty on the date in question. (T-374-388)

3. Panama City police officer Ralph Porter, who discovered the body of Mrs. Price in her automobile where it had been abandoned at a local cemetery. (T-410-421)

4. Panama City police Sergeant Tommy Winslett, who also responded to the cemetery and who testified, inter alia, to the identity of Mrs. Price. (T-426)

5. Powell Adams, who assisted in the search of the cemetary area and who testified that he found a tan jacket lying under a piece of tin in the woods behind the cemetery. This is significant because other witnesses testified that the Defendant JACKSON owned and/or was wearing on the date in question a jacket variously described as gold with a rainhood to beige with no hood. The jacket Mr. Adams found was tan with no hood. (T-444-449)

6. Dr. Ralph Monaco, the medical examiner who testified as to injuries and cause of death of both women. (T-445-467)

7. Jacquelyn Williamson, who saw the Defendant JACKSON at approximately the time of the incident when he appeared at her apartment which is located behind the cemetery previously mentioned. (T-479-485)

8. Jack Mason, then a camera man for a local television station, who gave the Defendant JACKSON a ride at approximately 10:15 a.m. on the morning in question (the crime having been committed some time between 8 and 9 a.m. that morning). Mason testified that the Defendant JACKSON appeared to know about the shooting at the cemetery even though the information to that effect had not yet been released to the news media. (T-490-493)

9. Jack Dungan, a fingerprint examiner with the Florida Department of Law Enforcement, who testified that one of the Defendant's fingerprints was found on a package of

Kool cigarettes found inside the Price motor vehicle. Duncan concluded this by comparing the fingerprint with a set of ink fingerprints which Bay County Deputy Sheriff William Sellers testified he took from the Defendant. However, at trial, the ink prints which Sellers claimed were the Defendant's had no markings or writings on the card to identify them as having been taken by Sellers or from JACKSON. In addition to her failure to depose Duncan, JACKSON's court-appointed attorney failed to depose Sellers and failed to inspect the fingerprint evidence. This failure resulted in her not objecting to Sellers' identification of the card of ink fingerprints as being those of the Defendant and thus, they were allowed into evidence as "undisputed testimony". (T-534)(T-523-531)

10. Bay County Sheriff Easterling, who testified, inter alia, to an incriminating statement made by the Defendant JACKSON. (T-579 et seq.) As a result of her failure to depose Sheriff Easterling, Defendant JACKSON's court-appointed counsel filed no pretrial motion testing the admissibility of the incriminating statement and at trial she interposed the weak objection of simply "Judge, we object to the introduction of the statement on the grounds that it was not freely and voluntarily given." (T-565) No pretrial motion nor objection was made predicated upon the Defendant's request for counsel, and notwithstanding the sheriff's admission that the Defendant had made such a request. (T-42,104)

11. Bay County Deputy Sheriff William Sellers, and Tom McCauley, Stenographer Janet Boyd and Bay County police officer Mancil, all of whom were present during the above-referenced statement to Sheriff Easterling. (T-519)

12. Bay County Deputy Sheriff Bill Lewis who testified among other things, to a second statement made by the Defendant JACKSON which statement was contradictory to the statement JACKSON gave to Sheriff Easterling. Again,

this failure to depose the witness resulted in no pretrial motion testing the admissibility of the statement and again only a weak trial objection was raised, to-wit: "Judge, I object to the introduction of the statement on the grounds that Mr. JACKSON was represented by counsel and counsel was not informed of this interview in advance." (T-592) (T-582-600)

Another significant parallel between the case at bar and Weidner appears from Ms. Costello's failure to search out and interview defense witnesses. At the hearing on the Defendant's MOTION FOR POST-CONVICTION RELIEF, JACKSON testified that he told Ms. Costello where he was on the date and time in question and gave her the names of individuals who could testify thereto. (RH-89 et seq.) Indeed, Ms. Costello testified that she was advised by JACKSON of the existence of a number of potential alibi witnesses and of his activities on the date and time in question. She further testified, however, that she made no effort to contact and interview any of these witnesses because she concluded that they saw JACKSON too late in the day to provide him with an alibi. (RH-787 et seq.) Further, at the hearing on the Defendant's MOTION FOR POST-CONVICTION RELIEF, he called, among other potential alibi witnesses, John Raymond and Jesse Hudson; both witnesses testified to seeing JACKSON at or around the time of the alleged offenses. (RH-709). After this testimony, Ms Costello was recalled to the witness stand by the State. She then testified that in reviewing her notes from her file she discovered that on June 25, 1975, Assistant State Attorney Jim Appleman, (now State Attorney

Jim Appleman) told her of two witnesses who were prepared to testify that they did not see CARL JACKSON on the date in question. Those witnesses were identified as John Raymond and Gerald Davis. Hence Ms. Costello accepted this representation from Mr. Appleman and made no effort to contact Davis and Raymond to confirm whether or not they could provide her client with his badly needed alibi. (RH-783 et seq.) She further testified that notwithstanding the fact that JACKSON told her he was at the Royal Cafe operated by Jesse Hudson at the time of the alleged crimes, neither she nor an investigator visited the cafe in an effort to corroborate this information. In other words, notwithstanding the fact that Ms. Costello, by her own admission, had no theory of defense, she failed to explore the one possible defense available to her, that being the defense of alibi. This, notwithstanding the fact that her client provided her with the names of witnesses who might help her. Indeed, she accepted without question, the word of counsel for the prosecution that two of those witnesses would not be helpful. It is respectfully submitted that this failure falls below the standard of effective assistance of counsel. The parallels between the case at bar and the Weidner case are too striking to be ignored.

In conclusion, the Appellant CARL JACKSON feels that this Court should grant rehearing and should reconsider the facts of his case, as briefly outlined above, in light of the recent

decision of Weidner v. Wainwright, id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished to DAVID P. GAULDIN, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 by U. S. Mail this 11th day of August, 1983.

Respectfully submitted,

LARRY G. TURNER

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defense, or any possible defenses that you might present on his behalf?

A Yes. Could I say one thing, I assume that at this point, there's no longer any attorney-client privilege attached?

THE COURT: That's correct, the filing of the motion relieves you.

THE WITNESS: Yes, I discussed some possible defenses with Mr. Jackson.

BY MR. TURNER:

Q Did you discuss with him the defense of alibi?

A Are you asking me if he told me of any alibi?

Q Okay, I'll take that.

A It was very vague if he did.

Q Did he or did he not, or do you remember?

A I don't remember.

Q Do you remember discussing with him that among the defenses available to one in his position is the defense of alibi and if he had such a defense, did you have that discussion?

A I don't know, but I certainly wasn't going to suggest to him to concoct an alibi after the fact.

Q And you don't know whether or not you discussed with him the possibility of alibi defense?

A I remember that he did tell me something about I

wasn't there, but he never told me the names of any witnesses that could verify that statement.

Q And you made no inquiry?

A I asked him where was he, with whom was he, who could I talk to about it and he never told me.

Q Did you talk to a man named John Raymond?

A Not that I recall.

Q Were you ever advised of a witness by the name of John Raymond by the State Attorney?

A Not unless it's in the record.

Q You have no recollection of it?

A No, sir.

MR. TURNER: May I have just a second, Your Honor, to confer with co-counsel?

THE COURT: Yes.

(Mr. Turner and Mr. Salmon confer off the record.)

BY MR. TURNER:

Q Does the name JuJu mean anything to you, the nickname JuJu?

A No, but I don't have my notes present today. It doesn't ring any bell, no.

Q Ms. Costello, in preparation for this trial, did you file any pre-trial motions other than the Motion for Change of Venue?

A I think whatever I filed is in the record.

been contacted by John Raymond on behalf of Carl Jackson?

A Who was John Raymond?

Q Well, specifically did they tell you that they had been contacted by John Raymond who offered alibi evidence or exculpatory evidence on behalf of Carl Jackson?

A I was never told anyone offered such information, no, nor did Mr. Jackson tell me that there was such a person.

Q Nor did you inquire?

A Oh, that's not true. Certainly I asked Mr. Jackson numerous times to tell me where he was that day, what he had been doing, what defense that he had, why Mr. Harris would make up such a story about him.

Q In your conversations with Carl Jackson, did you find him difficult to communicate with?

A Yes.

Q Did you find him resistent to open up to you?

A Yes.

Q Did you sense any hostility from him?

A I felt that he was very weary.

Q In fact, you didn't like Carl Jackson, did you?

MR. GAULDIN: Objection, irrelevant.

MR. TURNER: It's extremely relevant, Your Honor, it bears directly on the job that she did on his behalf.

THE COURT: All right, Mr. Gauldin.

CROSS EXAMINATION

BY MR. GAULDIN:

Q At the beginning of your testimony, you testified you had approximately 10 felony trials prior to the time in which you tried Carl Jackson; of those 10 felony trials, were any of them homicide trials?

A Yes.

Q How many of those, do you recall?

A One, maybe two.

Q And what degree homicide were those?

A Second degree.

Q Now, they have alleged that you didn't depose witnesses and, of course, the inference from that is that you didn't prepare for that, was there a preliminary hearing in this issue?

A Yes, there was.

Q Did witnesses testify at that preliminary hearing?

A Yes, they did. The fingerprint expert, the husband of one of the victims, Jimmy Harris, I think that was about it.

Q Did that testimony apprise you of witnesses that would have testified or you expected to testify at the hearing?

A You mean additional witnesses that I was unaware of?

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BY MR. GAULDIN:

Q What reasons would you have for not deposing witnesses?

A Okay, there were several reasons, primarily Chapter 939 which says that, I think it is 07, which says you cannot subpoena a witness for the defense unless you first apply to the Court, Trial Judge, to receive permission for the county to pay for an insolvent defendant and only one witness can be called per issue and that is the reason.

There are also other reasons why I wouldn't take depositions in every case, strategy reasons.

Q Okay. Could you elaborate on what you mean by strategy reasons?

A Such as sometimes I think -- (Interrupted)

MR. TURNER: Please the Court, I'm going to object to strategy reasons in other cases, which is what I understood her response to be.

She said there are also other reasons why she would not depose witnesses in other cases. We're talking about this case.

THE COURT: Well, I think that the response is to this case, but I will restrict it to this case, unless one of you wants to open us from a general reputation or something.

Do you remember the question, or do you want it

read back to you?

THE WITNESS: Would you repeat the question?

THE COURT: Okay, Sherri, would you go back and find the question.

(Whereupon, the Court Reporter read back the question appearing on Page 66, line 12.)

THE WITNESS: Okay, for instance, I would not want to take the deposition of the husband of the victim. I felt that he had been through enough and there was no particular purpose to be served in taking his deposition.

I asked him very few questions at the preliminary hearing and at the trial because I really didn't think he had anything much to add to the defense, and I think that would just have antagonized him and the jury.

Other witnesses, I may not to have wanted to have them pinned down to their testimony by taking their deposition, getting it so firmly in their mind that they wouldn't change it later on. On the other hand, you might want to do that.

There was also, you know, a question of the time, too. It was not customary to take the deposition of every single witness. It was difficult to even take the deposition of one person, and I didn't have any argument, the State didn't object to the one witness

nor did the Judge. There was no difficulty in that. There would have been some difficulty in just across the board taking of depositions of all of the witnesses.

BY MR. GAULDIN:

Q Do you think the Judge would have objected to that?

A Yes. I know the county would have because they would have had to pay for it.

Q Do you, as many defense lawyers feel,that this perhaps would prepare the State more than they otherwise would have been prepared?

MR. TURNER: I object to the form of that question, do you, as other defense lawyers do.

THE COURT: Sustained.

BY MR. GAULDIN:

Q In this case?

THE COURT: Even sustained,in this case. It calls for a conclusion on the part of this lawyer as to --

(Interrupted)

MR. GAULDIN: Judge, it's a matter of strategy --

(Interrupted)

THE COURT: Wait a minute, hold on a minute, read the question back, Sherri. Listen to this question.

(Whereupon, the Court Reporter read back the question appearing on Page 448, Line 9.)

THE COURT: See, how can she state whether the State was more prepared or not?

MR. GAULDIN: Judge, it's a question of strategy, whether she feels it would have prepared the State by having depositions.

THE COURT: In this case.

MR. GAULDIN: In this case, yes, sir.

THE COURT: Whether her lack of deposing kept them from being less prepared?

MR. GAULDIN: They have charged she was ineffective because she did not depose more than one witness. One of the possible strategical reason for not deposing witnesses is because a defense attorney will feel that it prepares the State more than the State would otherwise be prepared.

In other words, they get to listen to the deposition, they know what the witnesses are going to say beforehand, which they might otherwise not do if they, themselves don't take depositions.

THE COURT: You are confining it to this case?

MR. GAULDIN: Yes, sir.

THE COURT: All right, I will permit her to answer, if that's the reason.

THE WITNESS: Yes, that's a possible reason.

BY MR. GAULDIN:

Q Okay, let's move on to the Motion for Change of Venue. They have alleged that you were ineffective because you did not take a poll of the citizenry in the surrounding counties.

Prior to 1975, had that even been done?

A Not to my knowledge.

Q Was there any reason for you to do it in this case?

A I think I had a pretty good idea that there was plenty of ill-feeling in the community. I think that was pretty common knowledge. I don't think a poll -- I don't know how I would have accomplished a poll, who could have done it, who would pay for it, or how it would have been conducted, not back then. I know that has become later, but not in '75.

Q After going through the actual voir dire, did you feel a Change of Venue at that time was proper to raise, did you feel you would be successful on it?

A No. I don't know that I didn't raise it. I just really can't remember.

Q They have alleged that you hadn't filed various pre-trial motions, specifically a Motion to Suppress, was there any reason to file a Motion to Suppress prior to trial?

A Not to my knowledge.

Q Was there any legal basis to file a Motion to Suppress on the search of Vera Nickols' apartment?

A Not that -- (Interrupted)

MR. TURNER: Your Honor, if it please the Court, I am assuming that that question is limited in the way I was limiting my questions, at that time, did you see any legal reasons; not after the fact, do you now see any legal reasons.

MR. GAULDIN: I will so restrict the question, Your Honor.

THE COURT: You're right, Mr. Turner. All of these will be in time reference to prior to or at the time of trial.

THE WITNESS: No, I didn't, nor did anyone else with whom I discussed the case, specifically Mr. Williams or other attorneys in the Public Defender's Office were unaware of any legal grounds for such motions. I did not want to file frivolous motions.

BY MR. GAULDIN:

Q Did you feel that would irritate the Judge if you did?

A Of course.

Q Let's go back to the depositions, Mr. didn't you depose Jacquiline Williamson?

A The same reason that I did not think it was

necessary. I had her statement, I believe I talked to her on the phone about it, about the case. I am not for sure whether I talked to her or not, but I was furnished statements that she gave, and I did not feel it was necessary.

Let's put it this way, it might not have hurt, but I did not think it was vital to the Defense.

Q Again, concerning pretrial motions, why did you not file a pretrial motion concerning the jacket that was in question and the identity of the jacket?

A I did not know of any grounds upon which to file it.

Q To your preemptory challenges, do you recall how many preemptory challenges you had?

A Forty.

Q Why did you not request additional preemptory challenges?

A I don't know how you can -- I received more than the statutory requirements, so I don't know why I could have expected to receive more than that.

Q Was that a common practice prior to 1975 to request additional preemptory challenges?

A I am not aware of anyone receiving ever more than that. I thought the Judge gave us extra, so he was trying to be fairly liberal about the challenges.

Q Do you recall how many challenges for cause were granted on your behalf?

A No, I don't. You mean how many people that I challenged for cause -- (interrupted)

Q For cause and those were granted, yes, ma'am.

A I don't really remember. I think you can find that from the transcript. I did not keep a record of the cause; I did keep a record, of course, of the preemptory so I would not run out.

Q In discussing possible defenses with Carl Jackson, what defenses did you discuss with him?

A Well, I just asked him, tell me what happened, tell me why you have been charged, tell me what defenses you have. I did not go in and suggest to him what defenses there were to the offense. He never, he never told me that he committed a crime. He always stated that he was innocent, however, he did not give me any other defense than that.

Q Was he evasive with you when you talked to him?

A I did not think -- I did not think he trusted me particularly.

Q Did that in any way hinder the preparation of your case?

A To the extent that I don't think he was completely open. I don't know if he was not open because

he wanted to hide things from me or he did not just trust me because he did not know me that well.

I did try to visit him quite frequently to try to build up some rapport with him.

Q Given the circumstances of the case, what possible defenses were available to you?

A Well, of course, there was an alibi, if there was such a thing.

Q Was there any indication that alibi was a viable defense?

A No, I never received anything from Mr. Jackson or from anyone else for that matter. Of course, the other defense was, in the sense, the same kind of thing, it's not guilty, it was, and I tried to do that at trial, say it was Jimmy Harris, the person that committed the crime and not Mr. Jackson.

Q Were you worried about Mr. Jackson's ability to confer with you in regard to his mental condition?

A Not in terms of -- I felt I could communicate with him. I did feel that he was disturbed, and I did for that reason ask for him to be examined psychiatrically.

Q Was he examined psychiatrically?

A Yes. He was examined by one psychiatrist and one psychologist whom I selected from the available people in the community.

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MR. SALMON:

We're ready.

THE COURT:

Call your first witness.

MR. GAULDIN:

For the record, the State is ready, also.

THEREUPON,

JESSIE HUDSON, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SALMON:

Q Sir, if you would, state your name, please.

A Jessie Hudson.

Q Mr. Hudson, where do you live?

A St. Andrews, Fountain Avenue, 1505.

Q Is that here in Panama City?

A It's out in St. Andrews, we call it.

Q How long have you lived there, sir?

A Well, I've been living there for eighteen years.

Q Mr. Hudson, let me take you back to 1975. Do you recall the day that this double murder occurred?

A No, sir, I don't recall that day.

Q Do you recall the Sunday morning, though, that the crimes occurred?

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A Yes, sir.

Q Were you here in Panama City on that Sunday morning?

A Yes, sir.

Q Do you know who Carl Jackson is?

A Yes, sir.

Q Is that Carl sitting down there at the end of that table?

A Yes, sir.

Q Did you know him back then in 1972?

A Yes, sir. I've been knowing him practically all his days.

Q Do you recall if you saw Carl Jackson on that Sunday morning back in 1972?

A Yes, sir, that Sunday morning about 9 o'clock.

Q Do you recall where you were that Sunday morning when you saw Carl?

A Yes, I was down there at the Royal Restaurant.

Q Tell us again what time it was that you saw Carl that morning.

A It was 9 o'clock.

Q How long were you with Carl that morning?

A I reckon 'til about 9:30 or 9:40, the best I can recall.

Q Do you work here in Bay County?

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A Yes, sir.

Q Who do you work for?

A Bay County School Board.

Q How long have you worked for the Bay County School Board?

A I guess roughly about eighteen years.

Q Back in 1975 when Carl was being tried for that crime and after that morning when you saw him, were you available to be called as a witness?

A No, sir, I wasn't called.

Q Were you available? Were you---

A I was available. I was available.

Q Would anybody have had any trouble, if they needed to come over to St. Andrews or the Royal Cafe and ask for Mr. Hudson, would anybody have had any trouble finding you that day?

A No, sir, wouldn't have had a bit.

Q Do you go by any other names? Do you have any nicknames?

A T-Top. T-Top Hudson.

Q Would anybody have had any trouble finding you back then if they came looking for Mr. T-Top?

A No, sir, they wouldn't have no trouble.

Q If you had been called as a witness in Carl's trial, would you have been willing to testify about what you

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knew, about seeing him that morning?

A Yes, sir, I would have been willing.

Q Did anyone talk to you about the crimes, what Carl had been charged with?

A No, sir.

Q When you saw Carl that Sunday morning, was he acting any different?

A No, sir, not a bit, not a bit of difference.

Q Acting about the same as he always does?

A Always does.

Q At the time that you saw Carl that morning, were you aware of the crime or any crime having been committed?

A No, sir, I wasn't aware of none.

Q Did you find out later on that a crime had been committed?

A Well, I found out over the radio about 10:00 or 10:30.

Q That's when you found out that something had happened?

A Yes, sir.

Q Did you ever find out, did anybody ever tell you what time the crime was supposed to have happened?

A No, not exactly, they didn't tell me.

Q Did they give you a rough time? Did you have an aproximate time?

A Well, they said about 8:30, 8:00 or 8:30, something like that, but I didn't know it at that time.

MR. SALMON:

That's all I have, Your Honor.

THE COURT:

Any cross?

MR. GAULDIN:

Yes, Your Honor.

CROSS EXAMINATION

BY MR. GAULDIN:

Q Mr. Hudson, did you tell Carl Jackson you would be willing to testify on his behalf?

A No, sir, I hadn't told him. I didn't know nothing about it at that time.

Q At the time of trial or prior to the time of trial, did you tell Carl Jackson you would have been willing to testify?

A Well, you see, they came to me saying to testify.

Q Who came to you to testify?

A I can't think of that lady's name that was asking me about it.

Q A lady came and asked you about it?

A A lady and a man.

Q A lady and a man?

A Yes. I don't know their names. They told me

their names, but I can't remember it now.

Q Okay, would you recognize that person if you saw her?

A Yes, sir.

Q Do you see that person in the courtroom?

A I don't know her this morning. I don't see her this morning.

BY MR. CAULDIN:

Ms. Costello, would you please stand?

Q Does she look familiar?

THE WITNESS:

A That ain't the lady I was talking with, I don't think.

Q This wasn't the lady you were talking with?

A I don't think so. I don't see the lady I was talking with this morning.

Q Okay. Did you ever go to Carl Jackson, though, and tell Carl Jackson at any time that you were interested in testifying?

A Well, I didn't see Carl at that time.

Q Okay. Did you ever go to Carl's lawyer and tell Carl's lawyer that you were willing to testify?

A No, sir, I don't know his lawyer if I was to see her now. I wouldn't know her. I ain't never seen her. If I did, I don't know her.

Q Okay. Did you ever tell--- Whom did you tell that you would be willing to testify prior to the trial, before the trial?

A Well, they just came to me and said my first knowing about it.

Q And you told them what you told us today, that you knew, you saw Carl Jackson that morning?

A Yes, sir, I saw him that morning.

Q Did you tell them that you wanted to testify?

A Well, now they asked me would I, so, you know, it was said the first time that I talked with them Sunday night.

Q What did they say Sunday night? What did you say Sunday night?

A That's the same thing I had told them, I would come down. See, I was working, and they came up there and got me yesterday morning.

MR. GAULDIN:

One moment, please.

THE COURT:

You understand, I think he's talking about his appearance on the stand today. This past weekend he was asked to testify here today. Is that right?

THE WITNESS:

A That's right.

BY MR. GAULDIN:

Okay, Judge. I thought I asked him whether anyone talked to him about the time of the trial, whether--- Let me ask you this. Did they---

THE COURT:

Make that clear to him.

BY MR. CAULDIN:

Q Okay, on the record then, what earlier I was asking you about, did anyone back at the time of the trial, back in 1975---

THE WITNESS:

A No, sir.

Q ---ask you to testify?

A No, sir.

Q Okay. Now, the woman you were talking about, the woman and the man today that you talked about on the stand, was that someone that asked you to come and testify at this hearing?

A Well, they asked me, what you call it, give me a subpoena or whatever you call it. I've got it here in my pocket. That's all I know.

Q Subpoena?

A Yes.

Q Is that what it's called?

A That's what they gave me yesterday. That's the first that I had.

Q Okay. When you talked about Sunday night, was that Sunday night 1980, just a few days ago?

A Yes, sir, that's when I signed it.

Q That would have been November 2nd?

A I just signed it.

Q Okay, November 2nd, 1980. Would the name Charlotte Holman ring a bell?

A Ring a bell where at?

Q Sunday night at the---

A No, I don't have a bell at my house.

Q Okay, you can't remember. You can't remember. That's what you're saying. Let me ask you how far the Royal Cafe is from Franklin Avenue or Franklin Boulevard where the Jr. Food Store was.

A Well, it's about two, Franklin, from the Jr. Food Store?

Q Yes, from the Jr. Food Store.

A It's about a block, about two blocks, but it's more than two, I mean two blocks down before you get to Frankford. I don't know how far you would call it.

Q Okay. How long would that take to walk, do you think? Five minutes? Two minutes?

A You don't walk it in no five or two minutes.

Q It's two blocks?

A Well, where the Royal Restaurant is, it's the

second block down, but you've got to go down Frankford, I don't know how far you'd call it.

Q If you're walking?

A If you're walking.

Q You can't cut through houses or through lots or---

A You don't cut through some of them ti-ti.

Q Some of those what houses?

A Ti-ti.

Q Oh, swamp, okay. I'm not familiar with the geography. I'm just attempting to determine that. Did Carl Jackson, the day you saw him back in 1975 have a jacket on?

A I don't remember whether he had a jacket on that morning or not. I didn't pay that much attention. We were all laughing and talking.

Q But you don't remember whether he had a jacket on or not?

A I don't remember.

MR. GAULDIN:

Thank you.

MR. SALMON:

You can step down, Mr. Hudson.

THE COURT:

Call your next witness.

MR. SALMON:

Your Honor, we have another witness in the same

vein as Mr. Hudson who worked until about 6:30 this morning. I just talked with him on the telephone. He is on his way now. He figures it will take him short of a half an hour to get here to the courthouse. He would be the only other witness that---

(Off the Record Discussion.)

BY MR. SALMON:

I think that if we can just then take things out of order, we do have another witness that does not follow logically behind Mr. Hudson. Mr. Raymond will be here later, and we could call Reverend Jones for a---

THE COURT:

That's all right. Call whomever you wish.

THEREUPON,

JACKSON EARL JONES, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SALMON:

Q Sir, would you state your name for the record, please?

A Jackson Earl Jones.

Q Your occupation, sir?

A Pastor, St. Johns Baptist Church.

Q Where do you live, Reverend Jones?

A 645 East 10th Court.

Q Is that here in Panama City?

A That's in Panama City.

Q How long have you resided here in Panama City?

A Seventeen years.

Q Do you know a gentleman by the name of Carl Jackson, Reverend Jones?

A Yes, I do.

Q Is he here in the courtroom this morning?

A Yes.

Q Down here at the end of the table?

A That's him.

Q Did you know Carl back in the early part of 1975?

A Yes.

Q How long had you known Carl at that time?

A Ever since I had been in Panama City.

Q Could you tell the Court a little bit about how you knew Carl here in the community?

A Well, I guess I'm involved with young people. I'm a pastor, and I have young men in my church that play ball or what have you, and also come into the church where I pastor and what have you, and that's how I had the chance to know him.

Q Did you know Carl's family?

A Yes, I know his sister. I know quite a bit of the family.

Q Did you know other people in the community who knew Carl?

A Yes.

Q Can you give us an idea---

A I knew Mr. Homer Jackson, Mr. Robert King, the Reverend Long is now deceased, he knew him, and in fact, everybody in that area that I know I worked with.

Q Did you know other people in the community well enough who knew Carl to give an opinion on his reputation here in the community for peacefulness?

A Yes, I knew Mr. Jackson and Mr. King would say that, and they taught school here.

Q Are you familiar with what Mr. Jackson's reputation was here in the community for peacefulness and non-violence?

A Well, yes, I think I would be.

Q What is that opinion?

A In my opinion it's very good. I have never known him to get in anything that I know that involved the law.

MR. GAULDIN:

Judge, I would object, because as I recall, Carl Jackson wasn't put on the stand, and I don't think that's proper.

THE COURT:

The objection is overruled. This would be substantive evidence or something. They're going to have to connect it, because the question was whether--- There has been

an appeal, a direct appeal.

MR. GAULDIN:

Yes, sir, and that's the law of the case.

THE COURT:

And the conviction has been affirmed.

MR. GAULDIN:

Yes, sir.

THE COURT:

What we're trying here is the question of effectiveness of counsel, so this, if tied in, might be material to that, but they have to tie it in.

MR. GAULDIN:

Yes, Your Honor.

THE COURT:

All right.

BY MR. SALMON:

Q Reverend Jones, back in 1975 at the time of Carl Jackson's trial, did you feel at that time that you had information that was pertinent to the trial of Mr. Jackson at the sentencing phase?

THE WITNESS:

A Yes, sir, I would have been a character witness for him, yes, sir.

Q Were you prepared to come into court and testify on behalf of Mr. Jackson as to the things that you were familiar

with about Mr. Jackson as that might relate to the sentence to be imposed by this Court at that time?

A Yes, I would have.

Q Was your name made available to Mr. Jackson's attorney or anyone from Mr. Jackson's attorney's office that you were available and ready to testify on his behalf?

A My name was given to his sister that I could be a witness, was willing to be a character witness for him if they needed me.

Q Were you ever contacted?

A No, I wasn't.

Q Did you have an opportunity to talk to Mr. Jackson after he had been arrested?

A Yes, I did.

Q At the County Jail?

A At the County Jail.

Q Did you meet with him once, more than once while he was there in the jail?

A No, I only met with him once after the trial.

Q Let me ask you this one other question, Reverend Jones. Do you feel that you have information to present to the Court that might have had a mitigating effect on the sentence to be imposed on Mr. Jackson?

A I think I did.

MR. SALMON:

Thank you. That's all I have.

CROSS EXAMINATION

BY MR. GAULDIN:

Q Reverend Jones, you have indicated that you had some information that you thought that would go to the mitigation of the sentence imposed upon Carl Jackson. Did you attend Carl Jackson's trial?

A No, I didn't.

Q Did you attend any portion of that trial---

A No, I didn't.

Q ---including the sentencing phase?

A No, I didn't.

Q When you talked to Carl Jackson after he was arrested, did you tell Carl Jackson that you would be willing to testify for him?

A Yes, I told him I would be willing to be a character witness for him.

Q Okay. Now, perhaps I misunderstood your testimony. A few minutes earlier I thought you said something to the effect that you told Carl Jackson's sister.

A Well, I told her, but I told---

Q Okay, you told both of them? Is that what you're saying?

A But I talked to him.

Q Did you ever contact Carl Jackson's attorney?

A No, I wasn't informed about who the attorney was.

Q Okay. If you were concerned with giving testimony concerning the mitigation of sentence, why didn't you go to the trial? Why weren't you interested enough to be at trial?

A To tell you the truth, sir, I didn't know the trial was even set, to be honest with you.

Q You didn't know the trial was set?

A No, he was sentenced before we even knew.

Q Do you read the newspapers?

A I do.

Q You do? Did you read the newspapers back in 1975?

A Yes.

MR. CAULDIN:

Thank you.

MR. SALMON:

I have nothing further, Your Honor. May I be excused for just a moment to see if either of our other two witnesses are here?

THE COURT:

Surely.

MR. TURNER:

Your Honor, we are ready to proceed with another witness.

THE COURT:

Call your witness.

THEREUPON,

BEN BLAKELEY, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TURNER:

Q Would you tell us your name, please, sir?

A Ben Blakeley.

Q Mr. Blakeley, would you lean a little closer to that microphone and pull it closer to you? You don't have to be real close, you can just--- That's good, right there.

A Ben Blakeley.

Q Where do you live?

A I live out here in St. Andrews.

Q In St. Andrews?

A Yes, sir, 2000 West 16th Street.

Q How long have you lived in this area?

A This is my home here. I was raised and born here.

Q Do you know Carl Jackson?

A Yes, sir.

Q Do you see him in this courtroom?

A Yes, sir.

Q Point him out, if you would, please.

A Right there.

MR. TURNER:

Let the record reflect that he has identified Mr. Jackson.

THE COURT:

The record so reflects.

BY MR. TURNER:

Q How long have you known Carl Jackson?

THE WITNESS:

A Well, I have been knowing Carl Jackson--- Of course, he is not as old as I am now, see, but I have been knowing him a long, all his days. He was raised here, too.

Q Was he raised in your neighborhood?

A Yes, sir.

Q What kind of boy was he when he was being raised up?

A Well, he was a quiet, easy boy. He never gave no trouble to nobody. Never heard nothing of him at all.

Q Do you know other people that knew him? Do you know other people that knew him?

A Yes, sir.

Q Did you then?

A Yes, sir. All the community out there knows him.

Q Everybody knew him?

A Yes, sir.

Q What was his reputation in that community for peacefulness?

A Just like I said, he never did have no trouble. I never seen him fight or nothing.

Q Did everybody that you ever heard talk about him say good things about him?

A Yes, a lot of people.

Q Mr. Blakeley, you own a business here in Panama City or in St. Andrews?

A Yes, sir.

Q What's the name of your business?

A Royal Restaurant.

Q The Royal Restaurant?

A Yes, sir.

Q Where is that located?

A 2000 West 16th.

Q Is that in the same neighborhood that Carl Jackson grew up in?

A Yes, sir.

Q Did he ever come in that restaurant when he was living here?

A Yes.

Q Did he come in there regular?

A Well, whenever he would be around, whenever he would be around he would come in. The times he came out---

I think he went in the service, and when he came back, he said, "Ben, I'm going to go to Gulf Coast school," so I don't know whether he went to Gulf Coast school or not, see.

Q Let me ask you this. Do you remember the day that these two women were killed here in Panama City, the women that Carl was accused of killing?

A Yes, sir.

Q Do you remember when that happened?

A Not the date, now.

Q Yes, but you remember it happening?

A Yes, I know it happened.

Q Do you remember whether or not you saw Carl Jackson on that day, the day that that happened, did you see Carl?

A Did I see Carl? Seems like he was at my place, I believe, that morning.

Q He was at your place?

A I believe he was at my place that morning.

Q Around what time of the day was it that you saw him that day? Do you know?

A Well, I wouldn't guess no time.

Q Well, would it have been as late as, say, 11:00 a.m.?

A No.

Q Could it have been as late as 10:00 a.m.?

A. No, he usually comes around over there around 8:30 or 9 o'clock. That's when I would mostly see Carl, see what I mean? It wasn't at 11 o'clock.

Q. You believe he was in your restaurant around 8:30 or 9 o'clock that day?

A. Yes, sir.

Q. Now, how was he acting that day? Do you remember? Was he acting any different than normal?

A. No, sir, he acted like he always did act.

Q. Now, did anybody from any lawyer's office ever come out and talk to you and ask you about that?

A. Not that I know of.

Q. If you were asked to testify on Carl's behalf at his trial, would you have done that?

A. That morning the two fellows and the lady that came out there the other night, I told them yes, I would come to town, so, but I didn't know who they were. They told me their names, but I still don't know their names if I seen them here again.

Q. But five years ago, you would have been willing to testify if you had been asked to testify?

A. Yes.

Q. But nobody asked you?

A. That's right.

Q. How long have you run that Royal Restaurant?

A I've been running that Royal Restaurant, about '45 and '46, '47, that's when I had it back, it wasn't in shape to operate it, about '47 or '48, somewhere in there.

Q Do you think most of the folks out in that neighborhood know you?

A Yes, sir.

MR. TURNER:

Just a moment, Your Honor. Thank you, Mr. Blakeley. You may inquire.

CROSS EXAMINATION

BY MR. GAULDIN:

Q Mr. Blakeley, do you remember what day of the week it was you saw Carl Jackson back in 1975?

A No, sir, not really the day.

Q Right what day, I mean, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday.

A Now, I just can't keep up with what day it was, see what I mean, around when he usually come in.

Q So you saw him back in 1975 on some day?

A Some day.

Q Right, you don't know whether it was the day of the crime or not?

A Right, that's right.

Q You really don't know then?

A I don't know that.

MR. GAULDIN:

I have nothing further.

REDIRECT EXAMINATION

BY MR. TURNER:

Q Mr. Blakeley, if you'll think back in your mind for just a moment to the day that this crime happened, do you remember that? Do you remember the date? I know you don't remember the day of the week or the day of the month, but do you remember when it happened?

A I heard when it happened. I mean I don't know when it happened.

Q Okay, but you remember hearing that it happened?

A That's right.

Q Okay. Do you remember whether or not on that day you saw Carl Jackson?

A Yes, sir.

Q Where did you see him on that date?

A Right at that place, my restaurant.

Q On the date it was supposed to have happened, Carl was in your restaurant?

A Carl was in my restaurant.

Q That was in the morning around 8:30 or 9 o'clock?

A Yes, about that time.

MR. TURNER:

No further questions.

RECROSS EXAMINATION

BY MR. CAULDIN:

Q How do you know it was the day it happened you believe you saw him?

A See, I know when I seen him, because I know him, you know, he would come---

Q No, I understand that you know him. I understand that you saw him some day, but how do you know that it was the day that the crime happened?

A The day that the crime happened?

Q Yes, sir.

A There was a bunch of people there in the joint, and at this time an ambulance was down here going this way and some of them boys said, "Somebody must have had a wreck down there, probably had a wreck, must have had a wreck," so I didn't pay no more attention to it.

Then later on, Tom said this woman got killed, and then another one got killed out there at Greenwood Cemetery. The Greenwood Cemetery is on 17th Street, and the Jr. Store is on Frankford, so at that time I didn't know who it was nor know nothing about it.

Q Okay, you just heard that from people that that was the day the crime occurred?

A That's what I heard.

Q Okay, so you didn't even read it in the paper?

A I don't read the paper too much. I probably would catch it on the TV.

MR. GAULDIN:

Okay, thank you.

MR. TURNER:

No further questions. Thank you, Mr. Blakeley.

THE COURT:

Call your next witness.

MR. TURNER:

Let's see if he's here. He's the one we had to raise up. Your Honor, he is not here. I wonder if we could rest subject to calling him upon his arrival. We expect him any moment, and---

THE COURT:

I'll permit that. No problem.

MR. TURNER:

And would be prepared, if the State has no objection, to go ahead and proceed with their case.

MR. GAULDIN:

I'm sorry, I didn't hear all of that, Your Honor.

MR. TURNER:

We have one witness left.

THE COURT:

He's got a missing witness, and he says if you've got a witness ready to go, if you would like to reserve the

right to put that witness on before he rests his case, but if you're ready to go. I'm ready to hear you.

MR. TURNER:

And I represent to the Court and to the State that his testimony will be substantially the same as that of the last witness and Mr. Hudson, so that there won't be any surprise.

MR. GAULDIN:

Okay, Your Honor. I'll have to check in the foyer there whether we have our first witness.

THE COURT:

Wait, suppose I declare a little recess here.

MR. GAULDIN:

That would be fine, Judge. That would be fine.

THE COURT:

That won't put so much pressure on the lawyers and y'all won't get gastronomical distress here or anything of this nature.

MR. TURNER:

I will announce, Your Honor, that this is our last witness. At that point, we're prepared to rest and take---

THE COURT:

How much time do you want, about fifteen minutes?

MR. TURNER:

I would think so. He was en route.

THE COURT:

The Court will be in recess for fifteen minutes.

(RECESS)

THEREUPON,

JOHN RAYMOND, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SALMON:

Q Would you state your name for the record, please?

A My name is John Raymond.

Q Mr. Raymond, where do you reside? Where do you live?

A I live at 1520 Fountain Avenue. I live at 1520 Fountain Avenue.

Q Would you repeat your name once again for Mr. Gauldin?

A John Raymond.

Q Is that 1520 Fountain Avenue address here in Panama City?

A City, yes.

Q How long have you resided here in Panama City?

A On and off I guess about twenty-four years.

Q Are you employed?

A Yes.

Q Where do you work, Mr. Raymond?

A Big Chiefs Restaurant.

Q Do you know Carl Jackson?

A Yes, I know him.

Q Is he here in the courtroom this morning?

A Yes, he is over there.

Q Did you know Carl Jackson back in 1975?

A Yes, I did.

Q How long had you known him at that time?

A Practically all my life.

Q Is he a friend of yours?

A Yes, he is.

Q Do you recall the day back in 1975 when these two murders occurred at the Jr. Minit Market store?

A Yes, sir, I was at my friend's house, Gerald Davis, that morning.

Q Do you recall seeing Carl Jackson on that morning?

A Yes, he came by that morning, stayed approximately thirty minutes to an hour.

Q Do you recall what time it was that you saw Carl Jackson that Sunday morning?

A It was between 8:30 and 9:30.

Q Had you heard or did you know that this double murdor had occurred at the time that Carl Jackson came to Mr. Davis' apartment?

A I think we learned about it at the time he was

there.

Q Was Carl acting strange, any differently than he does normally that morning when you saw him?

A No, he was real calm.

Q Were you available to testify at Carl Jackson's trial back in 1975, Mr. Raymond?

A Yes, I was.

Q Would you have testified had you been called at Carl Jackson's trial?

A Yes, I would have.

Q Would your testimony have been similar to the testimony you have given us here this morning?

A The same.

Q Did you make any efforts to make yourself known as a witness to the authorities back in 1975?

A Yes, I did.

Q Would you tell the Court, please, how you did that?

A I think I went down to the County Police Department and volunteered my information.

Q What was the information that you volunteered to the authorities?

A That I had seen him that morning between 9:30 and 9:30.

Q Did you give them any other information, names

of anyone that was there at the time?

A My friend, Gerald Davis.

Q Did anyone from the Public Defender's office contact you in reference to your testifying in Mr. Jackson's trial?

A I can't recall. I don't know if I talked to his attorney or not, but we never came up, so I don't think we got definite on anything.

Q Were you ever--- Do you recall being interviewed about the information that you had concerning Mr. Jackson's whereabouts on the 20th of April?

A No.

Q Mr. Raymond, you said that you thought that you went to the County Sheriff's Office. Are you saying that you are not certain that you went to the authorities?

A I think we did, because we weren't called in. We came down and volunteered our information.

Q Are you certain that you went to a police department or some law enforcement authority to volunteer your information? Are you certain that you went somewhere?

A Yes.

Q Is there any question in your mind about your going to the authorities and volunteering the information that you had concerning Mr. Jackson's whereabouts?

A No.

Q I may not have asked you, and if I'm being repetitive, I apologize, but do you recall how long you were with Mr. Jackson at Mr. Davis' apartment that morning?

A It was between the hours of 8:30 and 9:30, because about 9:15 we learned about the murder.

MR. SALMON:

That's all I have, Your Honor.

THE COURT:

Any cross?

MR. GAULDIN:

Yes, Your Honor.

CROSS EXAMINATION

BY MR. GAULDIN:

Q Have you ever been convicted of a crime, Mr. Raymond?

A Yes, I have.

Q How many times?

A Once.

Q Aren't you good friends with Carl Jackson?

A Yes, I am.

Q Would you lie for him? Wouldn't you?

A Not up here.

Q Not up here?

A No.

Q Could it have been the State Attorney's Office

that you went to give your information concerning Carl Jackson?

A I'm not sure, either there or the County--- It was some type of authority, yes.

Q Okay. Isn't it true that back at the time the crime was committed or around the time the crime was committed you told the State Attorney's Office that you never saw Carl Jackson on Sunday?

A No, that is a lie.

Q That is a lie?

A Yes.

Q What time was it again that you allegedly saw Carl Jackson on Sunday?

A Between the hours of 9:30 and 9:30.

Q You said you--- When did you learn about the crime?

A Well, the police started coming through the apartments around 9:15, something like that, questioning people. That's when we learned about it.

Q Whom were you with?

A At the time?

Q Yes, at the time.

A My friend, Gerald Davis.

Q And is Gerald Davis also a friend of Carl Jackson's?

A Yes, he lived in the neighborhood at that time.

Q Okay. Did you ever talk to Carl Jackson's attorney and tell them that you had, tell he or she that you had this information?

A I had to.

Q You had to, so you talked to her? Are you telling me that you talked to her?

A To the authority, whoever I came down to see. It wasn't her. I don't remember talking to her.

Q You didn't ever talk to the attorney?

A I seen her at the trial.

Q Okay. You were at the trial?

A Yes.

Q Why didn't you come up to her and tell her you wanted to testify?

A Why didn't I come up and tell her I wanted to testify?

Q That's right. Aren't you telling us today that you were willing to testify back at the time of the trial with what you had seen?

A That's right.

Q Well, if you were at the trial, why didn't you ask Carl Jackson's attorney to be allowed to testify?

A I was a witness at the trial.

Q You were a witness at the trial?

A Yes.

MR. GAULDIN:

One moment. Thank you, Your Honor.

THE COURT:

Any redirect?

REDIRECT EXAMINATION

BY MR. TURNER:

Q Just one other question. You were not called to the witness stand to testify, though, were you?

A No, I never was called.

MR. TURNER:

No further questions. Thank you.

RECROSS EXAMINATION

BY MR. GAULDIN:

Q Who summonsed you as a witness to the trial?

A I don't know. I had a subpoena.

Q You had a subpoena?

A Yes.

Q Do you have that subpoena with you?

A No, that has been five years ago or longer, I don't know.

Q Perhaps if it has been five years ago, you're a little shady about the details?

A No, I'm not shady about the details. I can remember that morning.

MR. GAULDIN:

Thank you.

THE COURT:

John, let me ask you a couple of questions. Have you lived at Apartment D202 in Panama Gardens?

THE WITNESS:

A Yes, Your Honor.

THE COURT:

And Gerald Davis, did he live at Apartment B203 at Pana Villa Apartments?

A Yes, Your Honor.

THE COURT:

Ms. Costello, can you stand up so that this witness can see you just a minute? When you came down to the trial, to Carl Jackson's trial, did you see that lady, did you talk to her? See her standing up out there in the glasses?

MS. COSTELLO:

I had long hair then.

THE WITNESS:

A Yes, I can remember seeing her.

THE COURT:

You remember seeing her?

A Yes.

THE COURT:

Did you talk to her here at the courthouse?

A Vaguely.

THE COURT:

Do you remember that? If you don't remember it, that's all right.

A. I can't remember.

THE COURT:

You can't remember that? Do you remember whether or not you talked to, let's see, I think Russell Bower was--- Who was the Chief Prosecutor at Carl's---

MS. PITTMAN:

Leo Jones and Jim Appleman.

MS. COSTELLO:

Jim Appleman and Leo Jones.

THE COURT:

Do you remember talking to, do you know Mr. Jones, Mr. Leo Jones?

THE WITNESS:

A. Yes, Your Honor.

THE COURT:

Do you remember talking to him about the case? Did you talk to him? Do you remember talking to him when you came down?

A. No.

THE COURT:

You do not remember talking to him? Did you talk to any lawyer while you were down here?

A I didn't talk to a prosecutor.

THE COURT:

You didn't talk to a prosecutor?

A No, sir.

THE COURT:

Well, the record shows on August 29th James Appleman subpoenaed John D. Raymond, Apartment D202, Panama Gardens Apartments and Gerald Davis, Apartment B203, Pana Villa Apartments, August 29, '75, and a subpoena was issued. I'm reading a precipae.

MR. TURNER:

Excuse me, Your Honor. Does the precipae show for when he was subpoenaed?

THE COURT:

It says the same thing. Here's a return on the witness subpoena. He was served August 29--- No, he was served 4 September 1975 by Willie Daniels who was a Deputy Sheriff.

MR. TURNER:

To appear when was my question.

THE COURT:

Let's see, this was September 9th at 9 o'clock, and this was on behalf of the State. He is also listed in the discovery process filed by the State on June 17, '75. His name and that of Gerald Davis were both disclosed.

ACCURATE COURT REPORTERS, INC.
[illegible] MAGNOLIA AVENUE
P.O. BOX [illegible], PANAMA CITY, FLORIDA [illegible]

All right, can Mr. Raymond be released?

MR. TURNER:

No, sir, with Your Honor's testimony, I would like to ask a question, if I might.

THE COURT:

All right.

REDIRECT EXAMINATION

BY MR. TURNER:

Q Were you ever subpoenaed to come down and talk to this lady right here before trial, the defense attorney?

A No, I wasn't.

Q Did she ever come out and interview you before trial? Did she come see you and talk to you before the trial?

A I don't think so.

Q Did an investigator or anybody ever, from her office ever come and ask you questions about what your testimony would be at trial?

A No, this is the most in depth that I have been questioned.

MR. TURNER:

Thank you. No further questions.

MR. GAULDIN:

I have some questions, Your Honor.

THE COURT:

All right, proceed.

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RECROSS EXAMINATION

BY MR. GAULDIN:

Q Why do you think you were subpoenaed?

A Because I came down and volunteered my information.

Q What was the information you volunteered to the State Attorney, obviously?

A The same thing I said now.

Q Why do you think they would want to subpoena you if---

MR. TURNER:

Now, if it please the Court, I object. It's argumentative, and it's also speculation why they would want to do whatever they would want to do.

MR. SALMON:

And it's pretty obvious, too, Your Honor.

MR. TURNER:

Well, let me rephrase that, Your Honor.

THE COURT:

Mr. Salmon, I thought you were asleep. I'm glad to see you back with us. Your amongst friends now. I didn't mean that derogatorily.

BY MR. GAULDIN:

Let me rephrase it.

Q Do you think it would be reasonable for the

State Attorney to subpoena you to testify that Carl Jackson was not in a position to have committed the crime?

MR. TURNER:

Your Honor, if it please the Court, again, I don't---

THE COURT:

Yes, it's a decision the witness wouldn't have to make. I think that's calling for a conclusion. He's got to read some minds in order to do that.

BY MR. GAULDIN:

Q One more time. You never told the State Attorney's office that you didn't see Carl Jackson on April 20, 1975?

THE WITNESS:

A I couldn't have. I would be lying.

Q You're not lying here today?

A No, I saw him that morning.

MR. GAULDIN:

Thank you.

THE COURT:

I take it the Petitioner rests.

MR. TURNER:

The Petitioner rests, Your Honor.

THE COURT:

All right. What says the State? Are you ready

to proceed?

MR. CAULDIN:

Your Honor, the State would, for the record, move for a motion for summary judgement. We have a standing objection to the expert testimony that has been presented, and on that basis,---

THE COURT:

Argue it in your brief. You all agreed on that, so I'll take it---

MR. CAULDIN:

Okay, fine, just for the record then, I'll---

THE COURT:

---under advisement, and you can--- I'm going to. I want you all to submit blind briefs now. Don't wait on the other party to raise the questions. Just come on with your briefs.

MR. TURNER:

I understood that we were going to work that out at then end of this.

MR. CAULDIN:

Okay, fine.

MR. TURNER:

I'm agreeable to that.

THE COURT:

Mr. Salmon, make a note of this motion he has

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made here now.

MR. GAULDIN:

Right, I just want this for the record, Your Honor.

THE COURT:

All right. In your briefs, now, touch on that somewhere, and I would appreciate it. All right, is the State ready to proceed?

MR. GAULDIN:

Just a moment, Your Honor. The State is ready to proceed, Your Honor.

THE COURT:

Call your first witness.

MR. GAULDIN:

Raymond Williams.

THEREUPON,

RAYMOND L. WILLIAMS, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GAULDIN:

Q State your name for the record, please.

A My name is Raymond L. Williams.

Q What is your occupation, Mr. Williams?

A I'm an attorney practicing here in Florida, and I'm an Assistant with the State's, excuse me, the Public

Defender's office. I also practice civil practice. In other words, I'm part-time assistant, all of our assistants are, and I'm First Assistant here in Bay County. I practice civil practice, also.

Q Okay. How long have you been so employed by the Public Defender's office?

A Thirteen years with the Public Defender's office. I have been practicing law sixteen years.

Q Were you so employed back in 1975?

A I was.

Q Where did you go to undergraduate school?

A Auburn University.

Q Okay. When was that?

A I graduated in 1949.

Q Okay. Where did you go to law school?

A I went to law school at Stetson in St. Petersburg here in Florida, and I graduated in '64.

Q What did you do after you graduated?

A The first time?

Q Yes.

A From undergraduate or---

Q Excuse me, after law school.

A After law school? I went in law partnerships with, well, I worked as an associate with Julian Bennett and Dayton Loque for a year and then became a partner. I stayed

there for seven years and then went into practice for myself.

Q Primarily what has your practice consisted of, what type of cases?

A Criminal law.

Q Do you have an idea of how many felony trials you have handled during the course of your practice?

A No.

Q Prior to 1975?

A We had the statistics pulled out of our office, out of our central office out of Blountstown, and I can't tell you exactly from that, because what we do is we lump them in from Bay County from all the assistants here and sent them on in, so many of this, that and the other, and I have handled hundreds of felony cases prior to '75.

Q How many homicide cases have you handled?

A Can I look at my records?

MR. TURNER:

Judge, I don't really object, but can we just have a predicate? Is he talking about up to this date or up to 1975?

BY MR. GAULDIN:

Q I'm sorry. Excuse me, in the event I don't specify, otherwise they are prior to 1975.

THE WITNESS:

A I understand that, and that's what I was talking

about, yes, hundreds of them.

Q And in this circuit?

A In the fourteenth circuit?

Q Specifically in this circuit.

A In this circuit I try---

Q Okay, let's break it up in two parts.

A All right.

Q First, how many capital cases or first degree, or murder cases, first, second and third degree murder cases have you tried in your career, and then secondly, how many of those have been tried in this circuit?

A All of them have been tried in this circuit. Can I look at my notes that I made?

Q Sure.

A These have to do with either first degree murders or rapes back when that was a capital offense.

Q Yes, sir.

A Or second-degree murders or manslaughters. This is prior to '75, and this is the best I can remember.

Q Sure.

A All right, twelve.

Q Twelve capital cases?

A Say twelve to fifteen. I can remember twelve that I have written down here. I had my secretary check the other files, and there are some files that we've got stored

that we would have to go way back in on that. These are, now not felony cases. I'm talking about murders and what I've just named.

Q Okay.

A In other words, from manslaughter on up to first, including murder and including rape when it was a capital offense.

Q Okay. Prior to 1975, what was your capacity at the Public Defender's office? Did you have---

A Yes, I've been a First Assistant for thirteen years since I first went with them. In fact, there wasn't but two of us at that time, the Public Defender and me, so naturally I inherited the title.

Q Okay, one final question in regards to your qualifications. When were you admitted to the Florida Bar?

A In '64.

Q Have you been a continuous member of the Florida Bar since then?

A Yes, I have.

MR. GAULDIN:

Okay, I proffer the witness, Your Honor, as an expert.

MR. TURNER:

As an expert in what area?

MR. GAULDIN:

Both capital cases and as a Public Defender.

THE COURT:

Now, you see, I don't think, in a hearing of this sort, I don't think you need to pronounce to the court that any witness is expert, because I'm both the tryer of the facts and sitting in the catbird seat conducting the hearing, so I will take all of these things. Just proceed with your--- I don't need to make it a pronouncement. I didn't in the case of Professor Ackerman. I didn't in the case of Judge Strawn.

I take the qualifications, and I'll measure them and weigh the evidence along with their qualifications, so you won't need a pronouncement out of the Court to---

MR. TURNER:

I don't really feel the need to voir dire. Are you, and I might ask this for sense of direction---

THE COURT:

Now, we will follow the procedure at that point. If you wish to question him about his qualifications, I'll be glad to listen to that.

MR. TURNER:

Well, I need to know what we're doing with him. Do you expect to call him as an expert witness as to whether or not effective assistance of counsel was rendered in this trial?

MR. GAULDIN:

Yes, I do.

MR. TURNER:

I need to ask a couple of questions if I might.

THE COURT:

You can ask some preliminary questions.

VOIR DIRE EXAMINATION

BY MR. TURNER:

Q Mr. Williams, were you not a consultant to Dedee Costello on this case?

A I was, Mr. Jackson's case, yes, sir. In fact, I was there during the whole trial.

Q Yes, and you sat with her during the trial, did you not?

A Well, I sat in the courtroom, yes. Part of the time I was at the counsel table. Most of the time I was over at the--- We had in the old courtroom, we had chairs to one side, eighteen chairs where we put the jury in, and then the jury then went to the other side, the old grand jury well.

Sometimes I sat over there, because I had a chair I could lean back in, but I could hear and see all the witnesses. Yes, sir, I was there for the whole five days.

MR. TURNER:

Your Honor, I would object to any testimony by Mr. Williams concerning his opinions as an expert witness or otherwise as to the effective assistance of counsel, because they are self-serving.

THE COURT:

Overruled. Partiality or impartiality of the witness is always a question that the Court can consider. You know the rule about how to weigh the testimony of witnesses. Now, remember your general jury instructions are still guidelines that I have to follow in this case, one of them which, of course, is interested in the outcome of the case, in this case interested in the outcome of the hearing.

MR. TURNER:

I understand all that, and I respect that, and I know that Your Honor will do that. Notwithstanding that, I interpose the objection.

THE COURT:

It was not, my remarks were not in the way of rebuke.

MR. TURNER:

I understood that.

THE COURT:

It was just in the way of explanation.

MR. TURNER:

I understood. I appreciate that.

THE COURT:

When I said I overruled your objection. These things will all have to come in and have to be weighed with the gravamen of his testimony. All right, you may proceed.

CONTINUED DIRECT EXAMINATION

BY MR. GAULDIN:

Q Back in 1975, if I can bring your attention back to that date, were you involved in the case of the State of Florida versus Carl Jackson?

A I was.

Q In what capacity?

A Well, it was being handled by our office, and Ms. Costello picked up the case at what we called first appearances or whatever we had back in those days, and we discussed the matter, and I felt that she was capable of handling the case, and I said, "Well, you be the trial, and I'll be the secretary, so to speak."

Q Okay. Why did you feel that she was capable of handling the case?

A Because I had seen her try other cases, not a first degree murder case, now, but I had seen her try lots of cases. She had been with us, I couldn't tell you, but several years. I thought she was quite qualified. Otherwise, she wouldn't have been with us on the staff.

Q Are you familiar with the standards of expertise that existed back in 1975 in Bay County in regards to trying capital cases?

A Yes, sir.

Q Did she fall within those standards?

A Yes, sir.

Q Were you at all of the pre-trial conferences?

A To the best of my recollection, yes, sir, yes, sir, I was.

Q Were you available if she needed you?

A All the time. In fact, she and Mr. Wager, another assistant, were in the same office with me. They shared an office with me.

Q Were you present during the course of the complete trial?

A Yes, sir. I might have stepped out across the hall to make a phone call and walk right back in.

Q Were you available to make objections if necessary?

A Yes, sir.

Q Did you have arguments at bench?

A Yes, sir.

Q With the court?

A Yes, sir.

Q Did you participate in those arguments?

A Every time there was an argument, I went to the bench, yes, sir.

Q Based on your experience and based on your experience at the trial, do you believe that Ms. Costello rendered the Petitioner reasonably effective assistance of

counsel?

A. I do.

MR. GAULDIN:

Thank you. I tender.

CROSS EXAMINATION

BY MR. TURNER.

Q. Mr. Williams?

A. Yes, sir.

Q. Have you had an opportunity ever to read the trial transcript in this case?

A. The trial transcript?

Q. Yes, sir.

A. Yes, sir, I've got a copy of it.

Q. No, sir, my question was have you had a chance to read it?

A. I have read, I've thumbed through it, yes, sir.

Q. Let me ask you, have you read the trial transcript from start to finish?

A. No, sir.

Q. When have you thumbed through it?

A. This past weekend.

Q. Over this past weekend, what portions of it did you thumb through?

A. The testimony of various witnesses.

Q. Anything else?

A Just to recall my memory, the voir dire part.

Q You did thumb through the voir dire?

A Yes, sir, that's the first volume.

Q Well, it's the first and half of the second volume, actually, isn't it?

A Well, true, true, but I have re-done mine. Mine is reduced to four volumes.

Q As is mine, but they're probably not in the same order, and that doesn't really matter, but let me have Volume I, if I might. Are you familiar with the decision of Witherspoon versus Illinois?

A Yes, sir.

Q Were you familiar with it in 1975?

A Yes, sir.

Q Can you tell me what that opinion stands for?

A It stands for whether or not someone is---

MR. GAULDIN:

Judge, I'm going to object. I didn't go into all of this, and I think it's beyond the scope of direct.

THE COURT:

Overruled.

THE WITNESS:

A It stands for the fact of whether or not someone could render the death penalty or not render the death penalty, their thinking on the matter.

BY MR. TURNER:

Q What is the opinion, what guidelines does that opinion give to trial counsel concerning voir dire inquiry on the issue of the death penalty?

A If the person says that they will under no circumstances vote for the death penalty, they can be excused for cause.

Q Were such people excused for cause during the voir dire process in the Carl Jackson case?

A Yes, sir.

Q On whose motion?

A Well, that would be on the prosecution.

Q On any of those occasions, did you interpose an objection?

A I did not.

Q Did Ms. Costello?

A Let's see, you're Mr.---

Q Turner.

A Turner, all right. I'll get you straight. Mr. Turner, I frankly don't remember, and I don't think so.

Q Did either you or--- Are you familiar with the phrase "rehabilitate a juror"?

A Yes, sir.

Q Did either you or Ms. Costello make any effort to rehabilitate any of the jurors?

A I did not.

Q Do you remember her doing it?

A I don't remember whether she did or not, Mr. Turner.

Q Would you be surprised to learn that there were some twenty witnesses excused from, or jurors excused for cause on Witherspoon grounds and on only two occasions did either you or Ms. Costello ask even a question of those jurors?

MR. GAULDIN:

Judge, I object. He is testifying, and he says he doesn't remember.

THE WITNESS:

A I don't think I asked any questions.

THE COURT:

Overruled.

BY MR. TURNER:

Q Do you recall that that is, indeed, the fact, that neither you nor Ms. Costello asked any questions at all of eighteen of those prospective jurors?

THE WITNESS:

A I don't recall.

Q Concerning the Witherspoon issue?

A I don't recall. I think if-- May I say this? If someone categorically says that they will not vote for the death penalty under no circumstances, under whatever their

beliefs may be, religious or whatever it might be, whatever it might be, I think that's their privilege. I might tell you right now that I don't believe in the death penalty myself, period.

Q You are an adversary, or you were an adversary of Leo Jones in this case, were you not?

A Yes, sir, on many occasions.

Q Okay, and when he asks somebody a question, you don't necessarily accept that as the truth, the whole truth and nothing but the truth, do you?

A No, sir, but I accept what a juror says when he says he won't vote for the death penalty.

Q You don't ever inquire as to whether or not in certain circumstances that juror might, in fact, be able to vote for the death penalty? You make no inquiry in that regard?

A I think the judges do that many times, rephrase them whether or not they will under any circumstances.

Q Do you remember if that happened in this case?

A I think so.

Q If I tell you it did not happen, would that refresh your recollection?

A No, sir.

Q Hypothetically, if it does not happen, do you feel you have any responsibility to your client to make that inquiry?

A Do I--- Repeat that one more time.

Q Yes, if the Judge does not do it, hypothetically if the Judge does not do it, in rendering effective assistance of counsel, do you feel you have any responsibility to talk to that juror and see whether or not that juror can be rehabilitated to sit in the trial of that case?

A Only in the case if that juror says they're so-so, they wave a little bit, what-not. Ichi cachi (phonetic) in Greek means, you know, so-so, like this.

Q Let me ask you this. Did you participate in a motion for change of venue?

A Yes, sir. I don't know that I signed it, but, I mean, I'm, certainly I knew about it.

Q Okay, and that motion was denied, pre-trial?

A Yes, sir.

Q With leave to renew it during the jury selection stage? You had that option, did you not?

A I can't recall. I'm sure we did.

Q Do you recall whether or not---

A If we couldn't get a juror, if we couldn't get enough jurors out of what we had, certainly I would---

Q Was it a part of the strategy during the voir dire process, the strategy you and Ms. Costello had, to inquire of jurors concerning pre-trial publicity and their exposure to it to see if you could test whether or not Carl Jackson could

receive a fair trial in this community?

A Yes, that's the questions they were asked.

Q What were they asked, sir?

A Well, the prosecution gets the first whack. He's the one that was asking the questions, if they read anything about it, and then they went over it, and many of them said, if I recall correctly, they had read about it and heard it on TV, or saw it on TV and heard about it on the radio.

Q Do you recall the inquiry made by Ms. Costello concerning that?

A No, sir, I do not.

Q Do you recall how many people were challenged for cause, if any, on the grounds that they had seen, been exposed to pre-trial publicity?

A No, sir, I do not.

Q Do you know if anybody was? Do you recall if anybody was excused for cause on your challenge or Ms. Costello's challenge on the grounds of---

A I do not, no, sir.

Q Did you feel, as an attorney representing Carl Jackson, that a change of venue was in his best interest?

A I felt that, yes.

Q In fact, that's why y'all put out the efforts to get affidavits and things?

A Yes, sir.

Q Were emotions running pretty high in this community about this case at that time, a black man killing two white women?

A No, sir.

Q Emotions were not running high?

A Wasn't running that high, no, sir.

Q How high? That high, you qualified that. Were they running medium high?

A Well, I've tried a lot of cases running higher than that.

Q In this case, were emotions running pretty high?

A No, sir.

Q Do you feel that---

A That courtroom wasn't even--- We had a much bigger courtroom, and that courtroom wasn't one-third filled up, or one-quarter filled up.

Q Do you feel as a trial lawyer in Bay County that racial bias or racial prejudice plays a role in some trials?

MR. GAULDEN:

Judge, objection. In the first place, that's not qualified as to time, and in the second place---

THE COURT:

That's sufficient right there. If you qualify it to time, I'll allow you to ask it, Mr. Turner.

BY MR. TURNER:

Q Up until this case in 1975, do you feel that racial bias and racial prejudice played a role in trials in this community?

A In a murder case, no.

Q You don't feel that racial bias or racial prejudice was an issue in this case?

A No, not in a murder case.

Q Is that why you and Ms. Costello decided not to make a detailed inquiry concerning racial bias and prejudice at voir dire?

A Well, I just didn't think it was necessary, that they were going to be, that they couldn't fairly try, that white people couldn't fairly try it or black people couldn't fairly try it.

Q Did the State Attorney during the voir dire process exclude the black jurors with preemptory challenges?

A I'm sure he did. He has got a right to use his challenges like he wants to.

Q That wouldn't have had anything to do with racial bias or prejudice, him getting rid of black jurors, would it?

A It might have had something to do with Mr. Jones' prejudice, but I don't think it had anything to do with the community.

Q Did you participate in any pre-trial discovery proceedings?

A Are you talking about depositions?

Q Okay, I'll take depositions.

A I don't think we took any depositions. In fact, I'm sure we didn't. We had statements from everybody. Here in this circuit we file the necessary motion to demand with the State Attorney's office, and whatever they've got, we can get.

Q So you received copies of statements taken from the witnesses by officers of the Bay County---

A Yes, or go take them ourselves.

Q In this instance, in this instance, did you receive copies of statements from witnesses, those statements having been taken by either the State Attorney or the Police Department or Sheriff's Department?

A Yes, sir.

Q Because you had statements, you did not feel it was necessary to take your own statements?

A Well, I'm sure that they were, the people were talked to by Ms. Costello and I, because one I recall myself talking to was Jimmy Harris, one of the most important ones.

Q Well, y'all deposed Jimmy Harris.

A Well, not only that, I talked with Jimmy Harris.

Q Is there anybody else you talked to?

A Sheriff Easterling, I'm sure.

Q Did you take a statement from Sheriff Easterling

concerning this case?

A No, sir.

Q What did you talk to him about about this case?

A About finding that jacket that Jackson admitted was his jacket. Man, that scared me to death when I found that jacket was near that car, just over the fence in that cemetery.

Q You talked to the Sheriff about that?

A Yes, sir, I'm sure I did.

Q Where did you do that? Do you remember?

A No, sir, I don't. I'm sure it would be wherever I ran into him, at the jail or some place.

Q Did you take any notes on that conversation?

A No, sir. I knew what the Sheriff was going to say. He wasn't going to change his mind. When you get these statements from these people, they're not going to go--- They're going to read that statement before they come in to take their deposition, and they're not going to change that, unless they're lying, and you can catch them in a lie.

Q So in your judgement it is not necessary then if you are unhappy with their testimony to take their deposition and see if you can get them to change their testimony?

A If I was unhappy with them, I would.

Q Were you happy with the Sheriff's testimony?

A I have never been happy with---

Q It scared you to death.

A I have never been happy with Tullis Fasterling's testimony at any time, period.

Q Why is that?

A Well, maybe because he was a pretty good Sheriff and knew what he was doing. Maybe that was it.

Q Well, I didn't ask you the maybes. Why were you never happy with it? Did he take liberty with the truth on some occasions?

A No, sir.

Q Never did that?

A No, sir. I wouldn't say that he lied, but he knew his business.

Q He knew how to answer questions, didn't he?

A Yes, sir.

Q He was a pretty good witness?

A Up until you make him mad. If you can make him mad, then you've got him cold. That's why he quit testifying on lots of cases.

Q Did you ever take his deposition to try to make him mad so you could have him cold to see if you could test his testimony?

A No, sir, but I would make him mad on the witness stand when he was under-Sheriffa lot of times. I asked if he was a sub-Sheriff, and he said, "No, I'm the under-Sheriff," and I said, "Well, doesn't sub mean under?" He got mad as a,

pardon the expression, he got mad.

Q As a wet hen?

A Sir?

Q Mad as a wet hen?

A Yes, sir, we'll use that terminology. That wasn't in this case, of course, now. We're talking about Mr. Jackson's case. No, sir. Mr. Easterling and I have been battling around for a long, long time, and I'm probably going to miss him, having him on the stand occasionally, but that's his problem.

MR. TURNER:

I have no further questions.

THE COURT:

Any redirect?

REDIRECT EXAMINATION

BY MR. GAULDIN:

Q One question, Raymond. Do you remember whether any black jurors were selected?

A I believe there was, but I'm not sure. I couldn't be positive.

MR. GAULDIN:

Okay, thank you.

THE WITNESS:

I think so.

THE COURT:

Listen, gentlemen, since you're not going to argue this case at the end, I want you to address yourself to this problem. Mr. Salmon, have you got your pen ready? Since 1950, I want to know from you why you have to object to the court rulings, that's 1950.

MR. TURNER:

I don't understand the Court's question.

THE COURT:

It's very simple. Prior to 1950, under the old rules, you had to file a bill of exceptions, object to all the Court's rulings. Since 1950, it's my understanding that you have, that all rulings of the Court are saved, with or without an objection. All right, I said, address yourself to that.

MR. TURNER:

We shall do that. My understanding is, if Your Honor wishes to discuss it--- We'll address it in the brief.

THE COURT:

Address it in the brief.

THE WITNESS:

Am I released from the room?

THE COURT:

Yes, sir. There are some--- Mr. Turner, I don't mean to make a blanket ruling or a blanket statement on that. I realize there are some rulings of the Court that you have to object to, but there are others, since 1950, it's my

understanding that you can have, you can reach any ruling of the court without stating your objection on the record. You can even ask the DCA to do it in the interest of justice, review any other rulings.

MR. TURNER:

My interest is they can do it unless, if it's plain error or if rattles the Constitution's dimensions, then you don't waive it by failing to object, but otherwise, if you don't make the objection, you waive it, and I'm pretty sure that that's the law.

THE COURT:

I don't think so. You take a look at that thing. I don't think it has to reach the dimensions of a Constitutional area. All right, anyhow, y'all take a look at that. All right?

MR. GAULDIN:

We call Judge Spear, Your Honor.

THE COURT:

Judge?

THEREUPON,

MERCER P. SPEAR, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GAULDIN:

Q Would you state your name for the record, please?

A My name is Mercer P. Spear.

Q Could you state your occupation, please?

A I'm an attorney at law, retired circuit judge.

Q Okay. When did you retire from the bench?

A Approximately three years ago.

Q Okay. Were you a circuit judge in 1975?

A Yes, I was.

Q That's in what county, please?

A Bay County, Florida.

Q When did you---

A Of course, for the fourteenth judicial circuit.

Q Yes, sir. When did you graduate from law school?

A 1934.

Q What law school did you graduate from?

A University of Florida.

Q What did you do after you graduated from law school?

A I took the Bar in the state of Oklahoma, went to Washington, D. C. and worked a couple of years for the Textile Labor Relations Board, General Accounting Office, and then came back to Florida and went into the private practice of law.

Q When were you admitted to the Florida Bar?

A 1934.

Q Okay. What did you do after you were admitted to the Florida Bar in Florida?

A Well, I shortly thereafter went out to Oklahoma

and studied---

Q Yes, sir. Excuse me, after you returned from Oklahoma. You're back in Florida.

A Well, I went to Washington from Oklahoma.

Q I'm sorry. What did you do in Washington?

A I was with the Textile Labor Relations Board and the General Accounting Office.

Q How did you get back to Florida?

A By train.

Q I was afraid I left myself open to that.

A I decided to come back and enter private practice of law.

Q Okay, when was that?

A That was in 1937.

Q How long did you remain in private practice of law?

A Until 1971 when I was appointed to the circuit bench.

Q Okay. Have you ever been anything but a private lawyer or a circuit court judge?

A Do you mean since I---

Q Prior to 1975.

A Since I came back in 1937 and entered the private practice of law, other than the time I was in the military service, I have been practicing law. I served as

State Attorney for this circuit and---

Q That's what I meant. When were you State Attorney?

A I was elected State Attorney in 1948, took office in January of 1949 and served one term.

Q Okay. While you were State Attorney, did you ever have the opportunity to try any capital cases?

A Yes, I did.

Q Do you recall approximately how many?

A No, I really don't. Several, but I really don't know. It has been quite a while.

Q Okay. As a circuit court judge, prior to 1975, did you have the opportunity to sit on the bench when capital cases were tried before you?

A During my term as circuit judge, I did, yes.

Q Do you happen to recall approximately how many that would be?

A Three or four.

MR. CAULDIN:

Your Honor, again, I tender this, just for the record, I tender Judge Spear as an expert.

THE COURT:

All right. Do you want to ask any preliminary questions about his qualifications?

MR. TURNER:

I think not.

THE COURT:

All right, you may proceed.

BY MR. GAULDIN:

Q Judge Spear, prior to 1975, were you familiar with the normal degree of confidence of attorneys in capital cases in the Bay community, fourteenth judicial circuit?

THE WITNESS:

A I was.

Q Did you preside as Judge at the trial of Carl Jackson?

A Yes, I did.

Q Do you remember who represented Carl Jackson at that trial?

A Ms. Dedee Costello and Mr. Raymond Williams with the Public Defender's Office.

Q Okay. Did the performance of Ms. Costello rise to the level of competence that you were familiar with in Bay County on capital cases?

A I thought so, yes.

MR. GAULDIN:

One moment, please. Thank you. Nothing further, Your Honor. Your witness, Larry.

MR. TURNER:

May I have just a moment, Your Honor?

CROSS EXAMINATION

BY MR. TURNER:

Q A couple of questions, if it please the Court. Judge Spear, have you had an opportunity to review the transcript of that trial?

A No, I haven't.

Q Have you done anything to refresh your recollection before coming here to testify today concerning the circumstance and events surrounding that trial and during that trial?

A I talked briefly with one of the Assistant State Attorneys and talked briefly with Ms. Costello about it.

Q When did you do that?

A It has been in the last few days.

Q Which Assistant State Attorney did you speak with, Ms. Pittman?

A Yes.

Q Do you recall what, if any, pre-trial motions were filed in that case by Ms. Costello?

A No, I do not, sir.

Q Do you have any awareness at all of what kind of pre-trial discovery or investigation she conducted?

A I have no---

Q I assume even five years ago you would not have known that.

A Not unless some motion had come before me to be ruled on, and I, frankly, do not recall.

Q Do you have a recollection today of the jury selection process conducted in that case?

A No, not, nothing about it that stands out in my memory.

Q Do you remember whether or not a Witherspoon inquiry was made of various prospective jurors?

A I have no independent recollection. There could very well have been, but I do not recall.

Q Do you recall whether or not Witherspoon was an issue in selecting that jury?

MR. CAULDIN:

Judge, I'm going to have to object to this, and I would like my objection noted for the record. I think the question I asked Judge Spear was whether he recalled whether Ms. Costello's performance was performance that rose to the level of the capital lawyers or lawyers that had represented capital cases in the Bay area community, and that was the only question that I asked him in regard to---

THE COURT:

Well, I'll permit the question in this case. I understand what you asked him.

BY MR. TURNER:

Q The question to you, Judge Spear, is whether or

not Witherspoon was an issue in this case during the voir dire process.

THE WITNESS:

A I do not recall.

Q Do you recall whether or not--- Generally, you don't recall the voir dire process very well at all today. Is that a fair statement?

A That's a fair statement.

MR. TURNER:

May I have just a moment, Your Honor? I need another set of notes.

THE COURT:

All right.

MR. TURNER:

I don't have any further quetions of Judge Spear.

MR. GAULDIN:

One moment, Your Honor.

REDIRECT EXAMINATION

BY MR. GAULDIN:

Q In the selection of the jury process, if there had been anything that occurred that would have been unfair or prejudiced the jury, would you have remembered?

MR. TURNER:

Your Honor, I want to note an objection to that. In the first place, it's a hypothetical. In the second place,

it calls for speculation. Thirdly, he testified he doesn't have much recollection of it, and fourthly, to some extent it's self-serving.

THE COURT:

Over-ruled.

THE WITNESS:

Could you have the question read back?

THE COURT:

Yes, Jackie, read it back.

(Whereupon, the Court Reporter read back the pending question as follows:

Q In the selection of the jury process, if there had been anything that occurred that would have been unfair or prejudiced the jury, would you have remembered?)

THE WITNESS:

A I probably would, so let me say this to you. Presiding over this type of case was very unpleasant, and I don't make any effort to record the details of a first degree murder case, and I just don't recall any such thing. I just don't recall.

MR. GAULDIN:

Thank you, Your Honor. I'm finished with the witness, Your Honor.

(OFF THE RECORD)

MR. GAULDIN:

Dedee Costello.

THE COURT:

Has this witness been sworn? She's still under-- You're still under oath, Dedee. You may proceed.

THEREUPON,

DEDEE S. COSTELLO, called as a witness, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GAULDIN:

Q Could you state your name for the record, please?

A Dedee S. Costello.

Q Are you the same Dedee S. Costello that testified yesterday in this proceeding?

A Yes, I am.

Q Do you remember who John Raymond is?

A Yes, sir, now I do.

Q When did you first have occasion to come in contact with John Raymond?

A I had an interview with Assistant State Attorney Jim Appleman on June 25, 1975 at which time he told me that there were two prospective witnesses for the State, Gerald Davis and John Raymond, and their testimony was that neither of them saw the defendant, Carl Jackson, on the Sunday that the murder was committed, and they were both home all day.

Q Did he indicate to whom he might have sold this

in addition to you?

A He told me that these statements were given to, and I really don't know if it was the State Attorney's office or the City Police or the Sheriff's Department. Other than that, when I was asked yesterday about that name, I had no independent recollection of it, because I never questioned the man since it was my understanding that he never saw Mr. Jackson.

Q Okay. How did you recover that independent recollection?

A I checked through my notes in my file that I kept at the time that I wrote in upstairs in the third floor of the courthouse at the State Attorney's office.

Q Are you testifying from your own independent recollection now?

A No, I'm not. I'm testifying from my notes.

MR. TURNER:

Then I would object to the testimony.

THE COURT:

On what grounds?

MR. TURNER:

On the grounds that she's not testifying from her recollection. She's telling us what her notes say. I assume that was her answer.

MR. TURNER:

Allow me to give a predicate.

MR. TURNER:

Why don't you?

THE COURT:

You're going to withdraw your objection?

MR. GAULDIN:

No, at this point I think he's got---

MR. TURNER:

I'll withdraw the objection if he'll rehabilitate it. How is that?

THE COURT:

Well, whatever y'all decide to do. If you want me to get in on it, fine.

MR. TURNER:

No, sir, I would prefer---

THE COURT:

If y'all are going to work this out among yourselves, that's perfectly all right with the Court.

MR. TURNER:

I will withdraw the objection.

BY MR. GAULDIN:

Q When did you prepare this note?

THE WITNESS:

A June 25, 1975 in Jim Appleman's office.

Q When did Raymond, Mr. Raymond talk to you?

A I have never talked to Mr. Raymond.

Q Excuse me. From whom did you learn that information that comprised your notes?

A Assistant State Attorney Jim Appleman at the time.

Q Okay. Did you make those notes contemporaneously?

A I made those notes as he spoke. I sat in his office and made notes. I didn't--- These are my original notes. They weren't re-typed, transcribed, re-written or anything like that. I have a date written on the front, and they're on yellow paper. It was just a whole bunch of things that he told me that day in response to my demand for discovery.

MR. GAULDIN:

Judge, at this moment, I--- Unless he wants to object, recollection recorded.

THE COURT:

Well, if I understand, if you refresh your memory from notes, it's your refreshed memory that's the evidence. If you do not have an independent memory, but you made notes at the time, then the notes are the evidence.

MR. TURNER:

I have no objection. I raise no objection.

THE COURT:

Well, now under the best interest rule, you're waiving an objection to her testimony.

MR. TURNER:

I understand, but I get the opportunity to cross examine her, though, and I don't waive that.

THE COURT:

Yes.

MR. TURNER:

I would like that opportunity.

THE WITNESS:

A Additionally, that---

THE COURT:

I'll send you a bill for the legal advice.

MR. TURNER:

I appreciate that. Would Your Honor be available for a consultation in the future?

THE COURT:

No, sir, I have had my turn in the pit. No, sir. All right, go ahead, Mr. Gauldin.

BY MR. GAULDIN:

Q Continue, Ms. Costello.

THE WITNESS:

A All right. Additionally, the name John Raymond meant nothing to me. The name Gerald Davis did, and I do recall this now, having reviewed those notes and some other notes from an interview with Mr. Jackson on the 16th of June, 1975 at the jail. At that time I now recall that Mr. Jackson told me that he went looking for Jerry Davis the morning of the murder,

the murders, and that he could not find him, that Gerry Davis was not awake, and apparently, that's the only time I---

He didn't mention the name John Raymond to me at any time. The only time I heard the name John Raymond was from the State Attorney, but Mr. Jackson did tell me that Gerald Davis, he did not see that day, and I recall that independently.

Q Does Gerald Davis go by any other names?

A I had the name Jerry Davis written down, as best I recall.

Q Do you recall a Jimmy Davis?

A I don't know anything about, I don't know anything about a Jimmy Davis offhand, no, sir.

Q Do you recall a person by the name of Jackie Williamson?

A Yes, I do.

Q How do you recall her?

A She testified, and she was also known as Jackie Stanley. She testified at the trial that Mr. Jackson was at her apartment, acted upset, went to the bathroom, stayed longer than the normal time to stay in the bathroom. She was half asleep. It was some time 8:00 to 9:00 in the morning.

This was the same time that he was, Mr. Jackson told me he was looking for Jerry Davis. This is the time, must have been some time after the murder had occurred.

Q Do you recall a James Ward?

A James Ward? There is, again, something about a James Ward from my notes that they saw him some time later on that morning, but I don't have much information about James Ward, no.

Q Okay. When--- You say "later on." What do you mean by that? Later on that morning.

A I mean some time after 10 o'clock in the morning. I might say that these offenses occurred some time between 8:30 and probably quarter to 9:00 in the morning, Sunday morning.

Q Did you represent Carl Jackson at first appearances?

A I did.

Q When was that?

A That was Tuesday following the, Tuesday, April 22nd. I do recall independently the morning of the offenses coming to the courthouse. That was my week on first appearance duty, and I had to be here at 9 o'clock, and I certainly was never late.

Q This is the 20th we're talking about?

A The 20th, Sunday, the 20th of April. I recall that it was a rainy, dreary, April morning, and riding to the courthouse, which was only--- My apartment was only a mile and a half, two miles away from the courthouse. I heard on the

radio that there had been a murder at a Jr. Store on Frankford Avenue. That was some time prior to 9:00 a.m. I was aware of it by the time I got to the Sheriff's Department. First appearances were at the jail.

I think at that time, a little bit later on that morning, maybe 9:15 or so, I heard that there was a second person murdered, had been found in the cemetery.

Q Are you familiar with a person by the name of Willie Wheeler?

A This was someone that Mr. Jackson told me that he saw, again, some time that morning, approximately 10 o'clock, which would have been after the murder.

Q Are you familiar with a Reverend Jones who testified here today?

A No, sir.

Q Did you ever have any contact with Reverend Jones?

A No, sir. He never contacted me. I never received his name from any member of Mr. Jackson's family, nor from Vera Nichols. I must say that the primary person that was assisting me from the, on Mr. Jackson's behalf was Vera Nichols. His sister was involved, his niece and his mother, but Ms. Nichols was the one that was gathering names and addresses for people to come and testify, and they never gave me that name or I would have contacted him.

Q Did Ben Blakeley, who was here today, ever contact you?

A No, sir, I never received his name. I did, Mr. Jackson did tell me in June, on the 16th, now that I recall in my notes, and I do recall this, that he had been at the Royal Cafe, but that the people were talking about the murder. I did not take that to be any kind of an alibi, since that would have been after the murders had occurred.

Additionally, that location was very close to the Jr. Store where the murder occurred.

Q How close?

A Several blocks.

Q How long would it take a person to walk?

MR. TURNER:

Which I object unless she knows.

MR. GAULDIN:

Judge, this is common experience, I think, for someone that has lived here. Certainly---

MR. TURNER:

I will object on the grounds that no predicate has been laid to show that she would have any way of knowing how long it would take to walk there.

BY MR. GAULDIN:

Q Do you know where the Royal Cafe is?

THE WITNESS:

A Yes.

Q Do you know where the crime scene was?

A Yes.

Q Did you ever have an occasion to visit the crime scene?

A Yes, I did.

Q Have you ever been by the Royal Cafe?

A Yes.

Q Do you know the approximate distance between the Royal Cafe and the crime scene?

A I would say about three blocks. They aren't--- Some of those blocks are long.

Q All right. Are you familiar with the possible route one could take to go from the Royal Cafe to the crime scene?

A I think you would have to go down 16th Street to Frankford.

Q All right, how long would it take a person walking at a normal pace?

A I don't really know. I have never tried to walk it.

Q Just an estimate. I know. Just an estimate.

A Under ten minutes, anyway.

Q Were you familiar with Jessie Hudson who testified here today?

A No, sir, I certainly wasn't.

Q Did anybody ever tell you that Jessie Hudson would be willing to testify?

A I don't think his testimony would have provided an alibi, because his testimony and the other man's testimony was that, as I recall, that people were talking about the murders. The murders had already been committed by 9:00 a.m., and I was aware of it prior to 9 o'clock, so I don't think that would have provided an alibi.

Q Yesterday you were in the courtroom, and you heard the testimony of Carl Jackson?

A Yes.

Q Did you ever tell Carl Jackson not to take the stand?

A I certainly did not.

Q Did he ever indicate to you he wanted to take the stand?

MR. TURNER:

I object. It's a leading question. I wasn't allowed to lead her when I had her on direct.

MR. GAULDIN:

I object to that, Judge. I was very generous yesterday in quite a few questions that he asked which required a yes or no answer which are classic leading questions.

THE COURT:

I'm not going to dip my gourd in that bucket of how generous you all have been to each other. It's my generosity that counts in this case.

MR. GAULDIN:

I agree with that, Your Honor.

THE COURT:

Don't lead her too much. She is your witness.

MR. GAULDIN:

All right, now I'll point out that he testified contradictory---

THE COURT:

Listen, the reason I relax these rules a little bit, we have no jury here. You would see, perhaps, a different judge up here if we had a jury sitting here, but this is just a hearing in front of the Court. I'm not going to hold you both to the line on that matter. Don't lead her too much. Go ahead.

BY MR. GAULDIN:

Q What conversations did you have with Carl Jackson concerning his rights at the trial?

THE WITNESS:

A First of all, Carl Jackson, most of the time, wouldn't even discuss the crime with me. When I would want to talk to him about it, he would say, "What do you want to know about that for?" and he would start telling me about his war experiences, about stacking bodies in helicopters. He was in

Vietnam for three tours of duty---

MR. TURNER:

Now, if it please the Court, I object. This is not at all responsive to the question that was asked, not responsive at all, and I object to the witness volunteering this information and in this tone of voice.

THE COURT:

Wait a minute, that's getting a smile on the record. I'll strike that stuff.

MR. TURNER:

I'm sorry.

MR. GAULDIN:

Judge, it's all relevant. It's relevant as to whether she had the opportunity to inform him of his rights.

MR. TURNER:

It wasn't on relevancy grounds.

THE COURT:

Pardon?

MR. TURNER:

It wasn't an irrelevant objection. It was unresponsive.

THE COURT:

Can you ask a proper question?

MR. GAULDIN:

Judge, I think it is responsive. It's part of

her response explaining whether she had an opportunity or not.

Q Did you have an opportunity to explain his rights to him?

THE WITNESS:

A I attempted to explain his rights to him, but it was very difficult because of his emotional state, to me.

Q What was that emotional state?

A Dazed, in many ways suspicious of me.

Q What remarks, if any, did he make that would indicate to you that he was dazed or suspicious?

A If I would ask him to tell me about what happened that day, he would look at me and say, "What do you want to know that for?" with a look in his eyes, to me, what was suspicious. He was, from the beginning, acted very pessimistic about his chances.

He kept saying, "I'm going to get convicted anyway. Anybody charged with killing two white women in this area will be convicted." He wasn't helping me with his defense because of that. I was not able to communicate with him in many ways because of that, and that's part of the reason I had him examined.

The doctors told me that he was not legally insane; however, he was not overly cooperative with me. It was difficult--- I never have ever told any defendant not to testify.

Q In relation to that attitude, what rights did you attempt to explain?

A I recall telling him that he had the right to testify, and he also had the right not to testify, that he had the right for the State to be required to prove its case against him, that he had no obligation whatsoever to produce any evidence whatsoever on his behalf, that it was their obligation to prove their case beyond reasonable doubt, that he had a right to a trial, of course, which he had, and any other---

I don't recall specifically, just his general rights that he had as a defendant. He didn't want to talk about the trial, however, with me. He wanted to talk about Vietnam.

Q Did you explain to him what consequences, if any, that might accrue if he did take the stand?

A Yes, and I also was aware of certain things that he had told me about the case that made it difficult for him to take the stand.

Q What were those things?

A He told me that the jacket found in the woods was his, that he left it there under a piece of tin.

Q Where was the jacket found? Do you recall?

A Yes.

Q Where was it found?

A The cemetery was on the corner, and between the cemetery and the Pana Villa Apartments is kind of an open field

and then some woods. It was in the edge of the open area. It was very close to the cemetery where Mrs. Price's body was found. It was a rainy morning, and I could never get an explanation from him as to why he would remove his jacket, except that he was scared. He didn't tell me of what he was scared.

Q Did you discuss the consequences that might accrue from the State Attorney if he took the stand?

A Yes, he was well aware of that.

Q Okay. What were those consequences?

A The State Attorney could cross examine him. Much of the time during the trial he sat there with his eyes closed. He said he was meditating, but I couldn't tell if he was awake or if he was asleep.

Q How would you characterize his participation in the trial with you?

A Minimal if not nil.

Q When did he first express, if he expressed, any dissatisfaction with your performance?

A He never specifically said he was dissatisfied with my performance, just that he was dissatisfied that he was convicted, which is, of course, understandable.

Q How did you come to represent him at clemency proceedings?

A I was appointed by Judge McCrary, and I went and

talked to him before I accepted the appointment and asked if he had any objections, and he told me he did not, that he was agreeable. That was in September of '79.

Q What communication, if any, did you maintain with him while he was in the prison after he had been sentenced?

A None. His appeal was handled by the Public Defender's office in Tallahassee.

Q Did he ever communicate with you?

A No, sir.

Q Did he ever communicate with you concerning the clemency proceedings?

A No, sir. I wrote him letters. He never responded. I asked him to fill out, for instance, I wanted to get his military records, and I sent him a form, permission for the Army to release his records, and he wouldn't mail it back to me.

I had to go over there in November and get him to sign it in person. I wrote him, I don't know, three, four, five letters which he never responded to.

But he was always friendly when I saw him at the clemency proceedings; however, I would say that his emotional condition at that time was very depressed, from what I could tell. In fact, we had to postpone one of the clemency hearings with the Parole and Probation Commission primarily at the request of one of the commissioners who could see that he didn't

really know what was going on. That was a year ago.

MR. GAULDIN:

Okay. One moment, please, Your Honor.

Q Are you familiar, Ms. Costello, with the Petitioner's amendment to motion for post-conviction relief and the second amendment to Defendant's motion for post-conviction relief filed in this case?

THE WITNESS:

A Yes. I don't have a copy, but I'm familiar with it.

Q If I could show you a copy, would you like to--- Let me make sure I haven't marked on it. Have you ever seen those motions?

A Yes, I have.

Q Where have you seen those?

A I was sent copies of these after they were filed.

Q If I could direct your attention to Page 8 of the second amendment.

A The second amendment?

Q Excuse me, the amendment, ordinarily an amendment is second. There was an original filed, but the amendment, Page 8.

A Yes.

Q And if you could direct your attention to question, I believe it is "LL", and I'll read it for the record.

"Failure of the Defendant's court-appointed counsel to adequately present mitigating factors to the jury," and I'll skip over a little, and of course, he's got the right to read the whole, if he wishes. "In particular, his most exemplary military service which resulted in the Court finding that there were no mitigating circumstances."

A Yes.

Q What knowledge did you have of his most exemplary military service?

A That he had been AWOL several times, that he had been demoted several times during his three tours of duty, that he was charged, and I think convicted, of possession of marijuana during his military service, that he was released from the military under a general discharge under honorable conditions, and that after eight years in the service his highest rank, his rank when he left the service was an E-2, which is an entering rank.

Q Okay. Do you recall what type of discharge he had?

A General discharge under honorable conditions, which is less than an honorable discharge. That is the reason I did not want his military service entered into the record. I didn't feel that was helpful back in '75.

Q Were you acquainted with his, if any, prior criminal history? That's also the second part of the question.

A Yes, he had some minor misdemeanor record. I think it was possession of marijuana, and I think it was a petty theft charge, conviction.

Q Were you interested in introducing those convictions or his lack or whatever you want to characterize it of criminal history before the jury?

A No.

Q Why were you not?

A Because I didn't think it would be helpful. I think it would have been damaging, although I didn't feel that it was particularly, and for a man his age, I didn't think it was a particularly heinous record; however, I didn't think a jury would feel that way about it and would think that he had a bad history and wasn't completely clean.

Q What led you to believe that?

A From what he told me, and I have also checked--- Well, I have checked the records. He told me about his military record. In fact, he talked to me quite extensively, as well as he talked to Dr. Warriner, the psychologist.

Q Why do you think that would not have been helpful?

A Because I don't think the jury would have thought a man eight years in the service should have exited as an E-2 with less than honorable discharge and with the history of AWOL and demotions and carrying a concealed weapon at one point,

which, I believe, was a screwdriver, but which demoted him, also.

Q Okay. I direct your attention to Page 7, and in particular, little "ff" on Page 7 in which the Petitioner has alleged that you were ineffective because you failed to make a substantial motion for judgement of acquittal.

A Yes.

Q What basis was there for a motion for judgemental acquittal?

A Once the fingerprint evidence was admitted and the statements of the Defendant and the testimony of Jimmy Harris, there really wasn't any basis, but, of course, it's required that one make such a motion to preserve the record on appeal, which I did, and that's the reason.

There was really no grounds to argue it. The overwhelming evidence against him made it very difficult.

Q How would you characterize the strength of the State's case?

A Strong, very strong once the, you know, once the evidence was admitted, certainly. Now, I argued against the admission of some of it, but once it was in, it was very difficult to get around a fingerprint under a dead woman's head with eighteen points matching the Defendant's.

That was, that, to me, plus the jacket in the neighborhood which was his, on his admission to me, and Vera

Nichols' admission to me, and the testimony of Jimmy Harris who dropped him off in the neighborhood, and the fact that he was that close by was an extremely strong case.

Q Okay. What do you mean by eighteen points?

A Okay. Fingerprint experts match the number of characteristics with a known fingerprint to a print that they find somewhere else, and they do it by what they call ridge details and different markings on the finger, and they say usually eight to ten characteristics are a good identification.

This was eighteen characteristics matched. The print that was found on the pack of Kool cigarettes in the brown paper bag under Mrs. Price's head while she was dead in the car, there were eighteen characteristics which matched the known print of Carl Jackson.

Q Okay. Let me refer your attention to Page 6 of that motion, under little "bb."

A Yes.

Q The Petitioner has alleged that, "Failure of Defendant's court-appointed counsel to object to the testimony of witness Easterling wherein he states in response to the Prosecutor's question concerning his identification of the jacket that he could not find his initials, and, therefore, he can not identify the jacket," and then in parenthesis Page 561.

Let me show you Page 561.

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Department.

Q Did you have an occasion to interview any witnesses---

A Yes, sir.

Q ---involved in that case?

A Yes, sir.

Q What witnesses do you recall that you interviewed?

A Probably more than two dozen. I would have to---

Q Did you have an occasion to interview a Gerald Davis?

A Yes, sir, I did.

Q Did you have an occasion to interview a John Raymond?

A Yes, sir, I did.

Q Do you recall when you interviewed them?

A Yes, sir, on Friday, April 25, 1975.

Q Do you recall, did they give you any statements?

A Not written statements. I conducted an oral interview and dictated the results of the interview.

Q Okay. After you received their statements, did you record them?

A Yes, sir.

Q When did you record them?

A They were typed on April 28th. I would have

dictated them between the 25th and the 28th.

Q What was the substance of the statement Gerald Davis gave you?

A That he knew Carl Jackson, that Carl Jackson sometimes came to his apartment, and he did come to his apartment on Monday following the incident at the Jr. Food Store on Sunday, but Gerry Davis told me that he did not see Carl Jackson at all on Sunday, the day of the crime.

Q What was the substance of the statement John Raymond gave?

A Pretty much the same. John Raymond told me that he had been at Gerry Davis' apartment on Monday morning when Carl Jackson came there, but he said he did not see Carl Jackson at all on this Sunday.

MR. GAULDIN:

One moment, please. I have nothing further, Your Honor.

CROSS EXAMINATION

BY MR. TURNER:

Q Mr. McKenzie, how is it that you came to have this interview with these gentlemen?

A I was trying to recall the same thing, and I can not recall for you how I knew their names.

Q They weren't there pursuant to a subpoena, were they?